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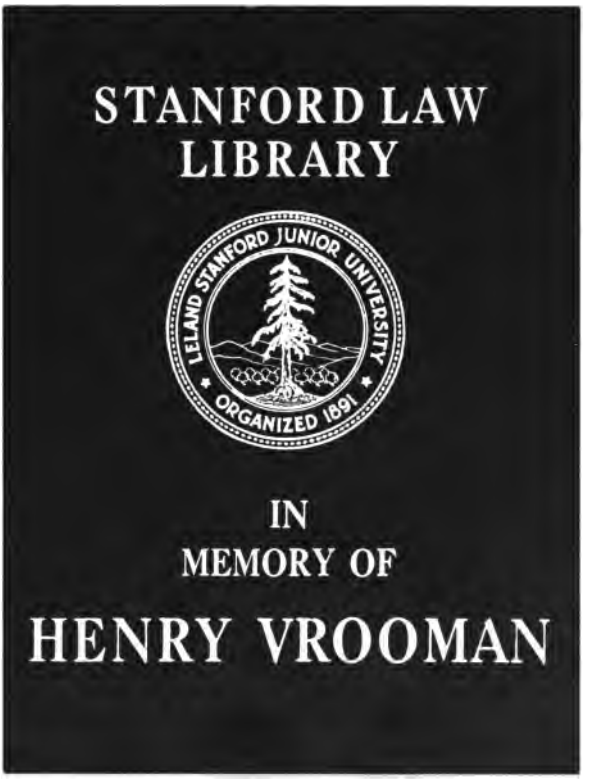
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THE MYSTERY OF THE PINCKNEY DRAUGHT

THE MYSTERY OF THE PINCKNEY DRAUGHT

BY

CHARLES C. NOTT

FORMERLY

Chief Justice of the United States Court of Claims

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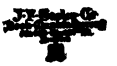

TO

CEPHAS BRAINERD

OF THE NEW YORK BAR

A SOUND LAWYER AND A LONG-TRIED FRIEND

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THE MYSTERY OF THE PINCKNEY DRAUGHT

THE MYSTERY OF THE PINCKNEY DRAUGHT

CHAPTER I

STATEMENT OF THE CASE

WHEN I began the studies which have resulted in this book someone asked me what I was doing, and I chanced to answer that I was looking into the mystery of Pinckney's draught of the Constitution. Afterwards I received a letter from Professor J. Franklin Jameson in which he spoke of the uncertainties attending the draught as "mysteries"; and later I found that Jared Sparks, back in 1831, had been engaged in the same study and had used the same term. With two such scholars as Professor Jameson and Mr. Sparks recognizing the knowable but unknown element which we call mystery, I retain the term which I chanced to use.

"A true mystery, instead of ending discussion, calls for more." "What constitutes

a mystery is the unknown which is certainly connected with the known. A mystery therefore is unfinished knowledge."[1]

At the opening of the Convention which framed the Constitution, Charles Pinckney of South Carolina presented a draught of a constitution that was referred to the Committee of the Whole. This draught was not a subject of notice or comment by any speaker or writer of the time. One might infer from the silence of all records and writers that it was the fanciful scheme of an individual which exercised no influence whatever on the Convention and did not contribute a single line or sentence to the Constitution.

On the adjournment of the Convention its records and papers were placed under seal and the obligation of secrecy was set upon its members. When ultimately the seals were broken and the package was opened, more than thirty years afterwards, the draught of Pinckney was not found. John Quincy Adams then Secretary of State applied to Pinckney for a copy; and he on the 30th of

[1] Dr. William Hanna Thomson, Brain and Personality, p. 278.

December 1818, sent to the Secretary of State the duplicate or copy of the draught now in the Department of State. The document was published and remained unquestioned until in 1830, six years after the death of Pinckney, it came, or was brought, to the attention of Madison; and he at different times wrote to at least four persons concerning it and also prepared a statement which was subsequently published with it in Gilpin's edition of Madison's Journal, and in Elliot's Debates; and then the Pinckney draught slept unnoticed in constitutional publications until a review in the columns of the Nation awakened an interest in Mr. Worthington C. Ford and he in 1895 published the letter which accompanied the draught when it was placed in the State Department. Nevertheless, if the copy in the Department is identical in terms, or substantially identical in terms, with the paper which Pinckney presented to the Convention, then Charles Pinckney contributed more of words and provisions to the Constitution of the United States than any other man. And this draught so prepared by him was so largely adopted in a silent way that the law student

who might chance to read it, not knowing of the comment of Madison and its rejection by all commentators, would be tempted to speak of the Constitution of the United States as the constitution of Pinckney.

The reason why the Pinckney draught has received so little attention, and he has received no credit at all for what apparently is an extraordinary piece of constitutional work can be readily explained.

The statement of Madison is written in temperate and guarded terms; and it is manifest that he was careful to speak with courtesy of Pinckney and to furnish an explanation in the nature of a bridge over which the friends of Pinckney, then deceased, might retreat. But what he does say instantly brings the reader's mind to the conclusion that the paper in the State Department is not the paper—that it is not a substantial copy of the paper, which was before the Convention. Story had been appointed by Madison and it was not for Story to accept what Madison rejected; and Story was so great a man, so great a judge and commentator, that it was not for lesser men to reverse him. Madison's comment and Story's

silence have united to condemn the draught so effectively that while printed and reprinted it has been as unnoted as if it had never been written. The final, judicial edict of George Bancroft expressed the general judgment when he wrote of the original draught which was actually before the Convention, "No part of it was used, and no copy of it has been preserved."

Moreover Madison is too great an authority to be lightly questioned, the highest authority that exists concerning the proceedings of the Convention; and he asserts and undertakes to demonstrate that the one paper can not be a true copy of the other. He designates provisions which he says originated in the Convention and could not have been predetermined by Pinckney; and still more conclusively, as he thinks, he points to the fact that the paper in the Department contains provisions to which Pinckney was himself opposed, provisions against which he spoke and voted in the Convention. Here Madison builds his bridge. Mr. Pinckney, he suggests, furnished this copy many years after the event (nearly 32 years), after he had become an old man and

the record of events had faded in his memory; and probably as the work of the Convention went on he had used a copy of his draught as a memorandum and had interlined in it provisions which the Convention framed; and when he sent the copy to the Secretary of State he had forgotten this, or had gradually come to regard the interlined matter as his own. A writer like Story with the training of a lawyer and a judge on finding the authenticity of the copy impeached in part would be almost certain to exclude it wholly from the consideration of the jury. Historical analysis and research may, nevertheless, render that clear which is obscure and show us where the work of Pinckney begins and ends.

There are some extrinsic facts which hitherto unknown should be noted.

In the first place this letter of Pinckney anticipates one of Madison's criticisms and explains away his strongest point.

"It may be necessary to remark," he says, "that very soon after the Convention met I changed and avowed candidly the change of my opinion on giving the power to Congress to revise the State laws in certain cases,

and in giving the exclusive power to the Senate to declare war, thinking it safest to refuse the first altogether and to vest the latter in Congress." Hunt's Madison, III, p. 22.

As to one of these things concerning which Pinckney says he changed his mind after the Convention met, the power of Congress to revise the laws of the States, the assertion is not sustained by Madison's record of the proceedings. He undoubtedly did change his mind but not until after the adjournment of the Convention. There was however another provision in his draught to which his assertion would apply. Concerning it he did change his mind and "avowed candidly the change of his opinion" and did so "very soon after the Convention met." This is the provision which declares that members of the lower house shall be chosen by the *people* of the several States. Article 3. As early as the 6th of June he proposed that they should be chosen by the *legislatures* of the several States. Writing 32 years after the event and when the record had faded in his memory, the two things, to use Madison's words, "were not separated by his recollection."

The letter is a contemporaneous declaration, given at the moment when he produced the document and placed it on file in the Department of State, that the copy, like the original, contained provisions which he opposed in the Convention. With this contemporaneous notice to the Secretary of State one of Madison's objections which at first seemed insuperable, if it does not fall to the ground, at least becomes susceptible of explanation; and the retention in the copy of the draught of these apparently inconsistent things, accompanied at the time, as they were, by Pinckney's declaration, not only removes the objection of Madison but tells strongly in favor of the draught being what Pinckney represented it to be.

In the second place Pinckney speaks of having "several rough draughts of the Constitution" ("4 or 5 draughts" he says) and he adds "that they are all substantially the same, differing only in words and the arrangement of the articles." Pinckney had preserved them certainly until the end of the year 1818, and "numerous notes and papers which he had retained relating to the Federal Conven-

tion." He also says that "with the aid of the journal of the Convention and the numerous notes and memorandums I have preserved, it would now be in my power to give a view of the almost insuperable difficulties the Convention had to encounter, and of the conflicting opinions of the members; and I believe I should have attempted it had I not always understood Mr. Madison intended it. He alone possessed and retained more numerous and particular notes of their proceedings than myself." These "numerous notes and memorandums, more numerous and particular" than those preserved by any other person, Madison "alone" excepted, and with them the "several rough draughts," which he found with the other papers on his return to Charleston in 1818, existed when Pinckney wrote his letter and placed his copy of the draught in the State Department. They existed both to refresh his memory and to refute him if he was not acting in good faith. He acknowledged Madison to be his superior in "notes and memorandums" and a particular knowledge of the proceedings of the Convention; and Madison was still living, and Pinckney by placing his

copy of the draught in the State Department invited Madison and all the world to examine it. That was the time when Madison should have spoken. It is most unfortunate that he waited fourteen years, and until after Pinckney's death and the death of every other member of the Convention, before he spoke.

Like many another young lawyer I came upon Pinckney's draught in Elliot's Debates and was astounded by finding so large a part of the Constitution apparently written by the hand of a man whom I had never heard extolled as a framer of the Constitution; and like many another young lawyer, I accepted the reasons of Madison and the silence of Story as conclusive. But the discovery and publication of Pinckney's letter in 1895 threw new light upon the subject and made it plain that Madison's objections should not be taken as final and that his premises needed corroboration. I therefore prepared the following inquiries in the hope that I could persuade some historical scholar to take up this work of Constitutional investigation.

1. Does the draught in the State Department upon its face appear to be an author's

draught—a, "rough draught," as Pinckney called it—with his corrections, erasures, interlineations and alterations or does it appear to be a duplicate or a fair copy of an original or "rough" draught? It is in the handwriting of Pinckney; does it appear to be his original piece of work, or an engrossed copy made by him of another paper?

2. If upon the face of the instrument it appears to be an engrossed copy, though in Pinckney's handwriting, that is a copy of the rough draught with its alterations and corrections engrossed therein, then the historical critic must proceed to try the issue of Pinckney's truthfulness. He tells the Secretary of State at the time when he produces the paper that "it is impossible for me now to say which of the 4 or 5 draughts I have is the one. But enclosed I send you the one I believe was it. I repeat, however, that they are substantially the same, differing only in form and unessentials." If this language be taken literally it means that he is about to place in the archives of the Department of State one of those "original" "4 or 5 draughts" and as he believes the very one of which he prepared an

engrossed copy for the use of the Convention. If the language be not taken literally, it at least means that he sends a true copy of one of the original rough draughts. Is there anything in the draught to refute either representation? Does it contain words, phrases, clauses, provisions which certainly did originate in the Convention; which were ground out there, and which could not possibly have been anticipated by Pinckney as he sat in his study early in 1787 making draught after draught for the consideration of the coming Convention?

3. Finally, it will be apparent on reflection that even if all of the foregoing issues should be decided against Pinckney; that is to say, if it should be found that the paper in the State Department is not an original draught—is not one of the four or five draughts to which Pinckney alludes, or that it contains interlineations of which Pinckney could not have been the author, even then after deciding all doubtful points against him a great deal will remain which must have been his; and historical criticism and careful analysis will be able to measure this residuum and give us a fair estimate

of its value, so that we can know with tolerable certainty how much of the Constitution was the work of Pinckney.

As I have not been able to persuade any competent scholar to take up this inquiry which seems to me to be an inquiry due to the truthfulness of our Constitutional history and to the memory of a framer of the Constitution whose work was not questioned until after his death, I have felt that the work has become a duty and that the duty has been imposed on me.

CHAPTER II

THE DRAUGHT IN THE STATE DEPARTMENT

THE Pinckney draught in the Department of State is written on unruled paper larger than common foolscap, hand made, and with untrimmed edges. The interlineations are few and trivial and clerical, the insertion of an omitted word and the like. There are two exceptions to this. In article 3 the draught says, "The House of Delegates shall consist of —— to be chosen from the different States in the following proportions: For New Hampshire——for Massachusetts——" etc., etc. But the names of the States are not set forth in the body of the instrument as they stand in all editions, being written on the margin and the place where they should have been inserted being noted by a mark.

The second exception is in the last line of article 5. The subject of the paragraph is the veto power; and the clause "all bills sent to the President and not returned by him within

—— days shall be Laws, unless the legislature, by their adjournment, prevent their return" was originally written, "unless the legislature by their adjournment prevent its return, in which case it shall not be the law." The words "its" and "it" are erased with the pen and the words "their" and "they" written over them and the article "a" and a final "s" are stricken out so that the clause as corrected reads as printed.

In at least two particulars the draught is erroneously printed in almost all editions. Pinckney did not write "Art. 1," "Art II," etc. Above the first article of the draught in the middle of the line, is written "Article 1." Over all the other articles, and likewise in the middle of the line, are simply the arabic figures "2," "3," "4," etc., without the word "article." The second particular, in which many printed copies are erroneous, is in article 3. The printer has there run together two parts of distinct sentences. The true reading is that each member of the House of Delegates shall be "a resident in the State he is chosen for," the sentence closing with the word "for." A new sentence then begins:

"Until a census of the people shall be taken in the manner hereinafter mentioned, the House of Delegates shall consist of —— to be chosen from the different States in the following proportions," etc. But in some we find that a delegate shall be "a resident of the State he is chosen for until a census of the people shall be taken in the manner hereinafter mentioned," which makes the intended provision senseless.

The first of the foregoing inquiries (p. 12 ante), Does the draught in the State Department upon its face appear to be an author's draught, a rough draught with his corrections, erasures, interlineations and alterations, or does it appear to be an engrossed copy made by him of another paper, has been answered decisively by Mr. Gaillard Hunt in his edition of the Writings of Madison:

"The penmanship of all three papers (the draught and the letter to the Secretary of State and a previous letter to the Secretary December 8, 1818) is contemporaneous, and the letter of December 30 and the draught were written with the same pen and ink. This may possibly admit of a difference of opinion be-

cause the draught is in a somewhat larger chirography than the letter, having been, as befitted its importance, written more carefully. But the letter and the draught are written upon the same paper, and this paper was not made when the Convention sat in 1787.. There are several sheets of the draught and one of the letter, and all bear the same watermark, 'Russell and Co. 1798.' " Vol. III, p. 16.

The draught, as before shown, contains a few verbal corrections, one or two trivial erasures, two or three obviously necessary interlineations but no alteration. That is to say it contains no alteration of substance—nothing which indicates on the part of the writer an intent to change or add to the substance of what he has written—there is no additional provision interlined, no obscure expression amplified, no omitted thought supplied—the corrections are one and all clerical. The document, therefore upon its face does not appear to be a "rough draught."

When the Secretary of State had written to Pinckney "I now take the liberty of addressing you, to inquire *if you have a copy of the Draught* proposed by you, and if you can with-

out inconvenience furnish me at an early day, *with a copy of it*" and Pinckney replied that among his notes and papers he had "found several rought draughts of the Constitution" and that "I send you the one I believe was it," and with the letter sent a document which obviously was not a rough draught, the fair and reasonable interpretation of his language (apart from an intent to defraud) is that he was sending what the Secretary of State had asked for, viz., "a copy" of the "copy of the draught proposed by you" to the Convention; and that what he meant to say was, "I send you 'a fair copy made by myself of the one I believe was it."

What a rough draught is may be seen by referring to the literal reprint of the Journal of Madison in the Documentary History of the Constitution by the Department of State. It is something which requires an editor to put the author's changes and amendments in their proper places. A constructive piece of work as long as the Pinckney draught, must have been cut, transposed, changed, added to over and over again. To be intelligible it would

require editing, and the Secretary had informed Pinckney that he wanted the "copy" for publication, and that he wanted it "at an early day": and no man would have parted with such an important paper and confided the editing of it to some unknown clerk in an executive department. In a word Pinckney did what any man similarly circumstanced would have done, he kept the original paper in his possession, and sent to the Secretary of State what he had asked for, "a copy of it."

If we turn now to the printed copy of the draught and note the extent of article 6, containing the enumeration of the powers of Congress, and the extent of the second paragraph of article 8, setting forth the powers and duties of the President, and if we remember that all this matter is to be found in the Constitution, it becomes instantly apparent that absorption of all these provisions by interlineation as suggested by Madison was absolutely impossible. In a word the bridge which Madison built breaks down. Therefore we must face the inexorable alternative: either Pinckney gave to the Convention a draught

substantially like that in the State Department or he fraudulently fabricated that draught after the Secretary of State had called upon him for a copy.

CHAPTER III

OF THE ISSUE OF FRAUD

ON this issue of fraud we must first look at the circumstances as they existed in December, 1818.

Pinckney had been a Senator of the United States, Governor of South Carolina, Minister to Spain and had just been elected to the important Congress which was to grapple with the National questions involved in the Missouri Compromise. He may have been a vain man as Madison thought him—(most men of great ability and prominence are egotistical; it is egotism ordinarily which impels them to the front) but no one has intimated that Pinckney could have been guilty of an act which from moral and historical points of view was little better than a crime. Some one contributed the many provisions which are to be found in the Constitution, and it would have been infamous to filch the honor from the real author. The most felicitous sentence in the

Constitution, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," if it was Pinckney's, passed through the Committee of Detail, the Committee of Style and the Convention without the change of a single word. It was one of those rare sentences of which everybody approved; and it is not lightly to be assumed that in 1818 Pinckney would steal such a conspicuous sentence from the Constitution and place it at the head of one of his own articles.

Moreover if the draught was a tissue of fraud detection was always possible; and detection would have blasted the life of Pinckney nowhere with greater severity than in his own State. In 1818 sixteen other members of the Convention were still living, and three of them had been members of the Committee of Style, and two of them (Charles Cotesworth Pinckney and Pierce Butler), had been delegates from South Carolina. Letters too from members might disclose the fatal truth. A son of some member might come forward with his father's draught of some of these provisions. Autobiographies, diaries and personal remin-

iscences of members might exist. Detection was possible, and in the ordinary course of human events, certain. Conversely it is proper here to note the fact that in all these years not a line of writing has been found to thrown a shade of discredit upon the Pinckney draught.

The temptation, too, was relatively small. The Constitution was not then in the estimation of the American people what it is now. No one then had proclaimed it to be "the greatest work ever thrown off by the brain and purpose of man." In 1818 the first work on the Constitution (Rawle's) had not yet been written. Monroe was President, and the country was just emerging from the poverty which followed the war of 1812–15. Pennsylvania and Georgia had defied the federal power and the latter had passed a statute making it a crime punishable with death to enforce the process of the Supreme Court of the United States. State feeling was always stronger in the South than in the North and out of State feeling had grown the doctrine of State rights. The South at that time could cherish no warm regard for the man who had

first written "all acts made by the legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the land."

It must also be noted that Pinckney was not a volunteer in this matter—that he did not thrust his draught upon the Secretary of State —that he never came before the public claiming to have contributed this or anything to the Constitution. The subject was introduced by Mr. Adams and not by Pinckney; and the draught was produced in response to Mr. Adams' inquiries concerning it. Pinckney showed no great solicitude about it then. His letter is slovenly and careless and manifestly not written for posterity, and it contains no indication of his regarding it as any thing more than a personal explanation. It was due to Mr. Adams to tell him that this draught which he inclosed was not a literal duplicate of the one which he had placed before the Convention; and it was due to himself to say that it contained provisions of which he had subsequently disapproved and which he had opposed in the Convention. Pinckney cer-

tainly did not suppose that he was writing history or biography when he wrote that letter.

The letter demonstrates how inadequately Pinckney estimated the greatness of the Constitution and overestimated his own part in the work, and how poorly the Constitution was then esteemed. At the beginning it had been but an experiment and in the opinion of many men an experiment that would fail. Under the moulding hands of Jay and Marshall it had become to Southern statesmen more and more an object of distrust and dislike. It seemed then a growing menace to the rights of the South and the sovereignty of South Carolina. For Pinckney to have asserted publicly that he was the chief author of the instrument and of its most offensive provisions would have inclined his fellow citizens in Charleston to say that instead of boasting of his work he ought to be ashamed of it; that where State rights were involved it was at best ambiguous; and that, if he was the author of the draught, he more than any other man had enabled the judges to interpret the Constitution in favor of Federal supremacy.

Certainly if this issue of fraud had been involved in a criminal case Pinckney would have been able to establish two things—good character, and the absence of a motive to defraud.

CHAPTER IV

MADISON AS A WITNESS

HAVING now seen what Pinckney said in 1818 and what he did and where he stood, let us turn to the other party in the controversy, Madison, and examine the testimony which he gave and the evidence on which he relied.

His journal (as edited by Gilpin) after setting forth the speech of Randolph on the 29th or May, and the reference of the 15 resolutions of the Virginia delegates, to the Committee of the Whole, contains this record:

"Mr. Charles Pinckney laid before the house a draught of a federal government to be agreed upon between the free and independent states of America."

"Ordered that the same be referred to the Committee of the Whole appointed to consider the state of the American Union."

But Yates's Minutes give us one thing more: "Mr. Pinckney, a member from South

Carolina, then added that he had reduced his ideas of a new government to a system, *which he then read.*"

Madison's report of Pinckney's speech on the 25th of June stops with the subject of State governments and the propriety of having but one general system. But Yates gives in a condensed form the conclusion of Pinckney's speech and contains the following sentences:

"I am led to form the second branch (of the legislature) differently from the report. I have considered the subject with great attention and I propose this plan (reads it) and if no better plan is proposed I will then move its adoption."

Once while reflecting upon the extraordinary, the seemingly inexplicable course which Madison pursued in relation to the Pinckney draught—positive and yet evasive; alleging but never testifying—my eye happened to fall on this minute of Yates and it suggested the fact of these repeated omissions of Madison's to state the contents of the Pinckney draught, and I asked myself the question, is it possible that Madison never knew what the

draught contained? In an examination of the facts relating to this question I found that the entry in the journal, above quoted, "Mr. Charles Pinckney laid before the house a draught" etc. had been taken word for word from the entry of the Secretary of the Convention in the official Journal. I found also that at four different times in the course of the debates Madison designated the draught by four different terms; as Mr. Pinckney's "plan" as Mr. Pinckney's "resolutions" as Mr. Pinckney's "motion" as Mr. Pinckney's "propositions," not one of which expressed the idea of a formulated Constitution. It is therefore evident that Madison did not hear Pinckney read his draught as Yates did, and did not hear him say as Yates did, "that he had reduced his ideas of a new government to a system." My inference then was and still is, that Madison was temporarily absent from the hall when Pinckney produced and read his draught and that on hearing of it he went to the Secretary's desk and copied the entry in the official journal—an entry which is also silent as to Pinckney having read the draught and which describes it in language entirely

different from Yates's and entirely different from Pinckney's, for Pinckney's draught does not profess to be an agreement "between the free and independent States of America," but is avowedly an act of the people of the United States. It therefore appears both positively and negatively that Madison was not present when Pinckney presented his draught; that he could not have heard Pinckney's designation of it as a "system" and could not have heard Pinckney read it to the Convention. He regrets in another place that he did not take a copy of it because of its length and it may be inferred from what may be termed his unfailing ignorance of its contents that he did not read it because of its length.

Madison had a poor opinion of Pinckney, a very poor opinion; and he held fast to it all through his life. During the sitting of the Convention the draught was referred to repeatedly in discussions and motions and references. Madison recorded what was said, and the more important of the motions and references, but his opinion of Pinckney was so poor that he did not put himself to the

trouble of stepping to the Secretary's desk and reading the draught, much less of taking a copy of it. In October 1787, after the dissolution of the Convention, he wrote from New York to Washington and Jefferson, the following letters:

James Madison to General Washington.

NEW YORK, Octr. 14, 1787.

. . . . . .

"I add to it a pamphlet which Mr. Pinckney has submitted to the public, or rather as he professes, to the perusal of his friends, and a printed sheet containing his ideas on a very delicate subject, too delicate in my opinion to have been properly confided to the press. He conceives that his precautions against any further circulation of the piece than he himself authorizes, are so effectual as to justify the step. I wish he may not be disappointed. In communicating a copy to you, I fulfill his wishes only."

(Gaillard Hunt's Writings of Madison, Vol. V., p. 9.)

Madison to Jefferson.

NEW YORK, Octr. 24, 1787.

. . . . . .

"To these papers I add a speech of Mr. C. P. on the Mississippi business. It is printed under precautions of secrecy, but surely could not have been properly exposed to so much risk of publication."

(Id., p. 39.)

Madison to General Washington.

New York, Oct. 28, 1787.

. . . . . .

"Mr. Charles Pinckney's character is, as you observe well marked by the publications which I enclosed. His printing the secret paper at this time could have no motive but the appetite for expected praise; for the subject to which it relates has been dormant a considerable time, and seems likely to remain so."

(Id., p. 43.)

In the memorandum "For Mr. Paulding" written shortly before April 6, 1831, reappears Madison's poor opinion of Pinckney. "It has occurred to me that a copy (of the Observations) may be attainable at the printing office, if still kept up, or in some of the libraries or historical collections in the city. When you can snatch a moment, in your walks with other views, for a call at such places, you

will promote an object of some little interest as well as *delicacy* by ascertaining whether the article in question can be met with."

On the 25th of November, 1831, he wrote to Jared Sparks, "I lodged in the same house with him, and he was fond of conversing on the subject. As you will have less occasion than you expected to speak of the Convention of 1787, may it not be best to say nothing of this *delicate* topic relating to Mr. Pinckney, on which you cannot use all the lights that exist and that may be added?"

On the 6th of January, 1834, he wrote to Thomas S. Grimke:

"There are a number of other points in the published draught, some conforming most literally to the adopted Constitution, which, it is ascertainable, could not have been the same in the draught laid before the Convention. The conformity, and even identity of the draught in the Journal, with the adopted Constitution, on points and details the results of conflicts and compromises of opinion apparent in the Journal, have excited an embarrassing curiosity often expressed to myself or in my presence. The subject is in several respects

a *delicate* one; and it is my wish that what is now said of it may be understood as yielded to your earnest request, and as entirely confined to yourself. I knew Mr. Pinckney well, and was always on a footing of friendship with him. But this consideration ought not to weigh against justice to others, as well as against truth on a subject like that of the Constitution of the United States."

And on the 5th of June, 1835, he wrote to William A. Duer:

"I have marked this letter 'confidential,' and wish it to be considered for yourself only. In my present condition enfeebled by age and crippled by disease, I may well be excused for wishing not to be in any way brought to public view on subjects involving considerations of a *delicate* nature."

Madison wrote with characteristic caution and courtesy but there is something very suggestive in the way he uses the word "delicate." Neither Mr. Paulding nor Mr. Sparks nor Mr. Grimke nor Judge Duer could have doubted that there was something wrong in the draught—something so wrong that Madison did not wish to speak of it.

It is manifest that when Madison first read the draught in the State Department, he was surprised. He does not say so, and is very guarded in what he does say; yet it is perfectly plain that the magnitude of this contribution to the Constitution was something absolutely new to him. He better than any other man was supposed to know, the work and workings of the Convention, and lo, here was a document of more importance than any given in his journal, or found among the records of the Convention, and of its contents he had been ignorant until the document was laid before the world by the State Department!

Between 1818 and 1836, the magnitude of this and its importance as an historical document was forced upon Madison's attention from time to time by younger men who took a warmer interest in the Constitution and its history and its framers than their fathers had taken; and it is apparent that he was astounded at the historical importance of the document. Marshall was then drawing near to the end of his majestic judicial reign, and though assailed and thwarted by the cavilings and dissents of lesser men, had placed his im-

perishable impress upon the Constitution and revealed to his countrymen its greatness and consistency and power of nationality. The growing interest in the great instrument would not be quieted. Madison would fain have kept silent, as he advised his two most trusted correspondents to do. But he could not! He was the greatest of authorities, living or dead, in all that pertained to the making of the Constitution; the last living member of the Convention; the sole chronicler of its secret history. It is as plain now as it was then that he must speak. What could he say?

Madison was not able to say, "I read the Pinckney draught when it was before the Convention, I studied it, I knew the contents well; the paper in the State Department is not a substantial duplicate of that paper." There remained then but this alternative; he must confess that he knew no more about the Pinckney draught than did the men who were interrogating him or he must do precisely what he did do, he must attack it on documentary evidence as an advocate, and must remain silent as a witness. If he had testified as a witness; if he had said of his own knowledge that

the paper which Pinckney placed in the State Department was not a copy of the paper which he had laid before the Convention and was not a substantial duplicate worthy of consideration, that would have been the end of the matter. Certainly I should never have felt called upon to make the present investigation. But Madison did not so testify. Under the pressure of steadily increasing interest in the Constitution, inquirer after inquirer came to him to explain how a man whom they did not regard as a wise statesman could have contributed so much to the Constitution, which they had regarded as the composite work of a number of great men. They did not come to him for reasons or advice or references to documentary evidence, but because he was the one survivor of the men who could have testified, the only chronicler of what had happened in the Convention from first to last, and they sought his personal knowledge. They asked him to tell them what he knew concerning the Pinckney draught, the original draught, the one which was before the Convention; and he answered not a word! We must reject Madison as a witness because he rejected himself.

CHAPTER V

MADISON AS AN ADVOCATE

AT this day Madison is regarded as one of the chief statesmen in the group of leading framers of the Constitution; but his best appreciated work was his keeping the only record which we have of that august assembly. He, who dealt with the great questions of the hour, may not have been aware how much good work the Pinckney draught was doing in an unnoticed way. Madison spared no effort to make his journal complete, and no little time in doing so. He copied and inserted in it the Virginia resolutions and the New Jersey resolutions; and he also inserted Pinckney's long speech of the 25th of June; and yet he did not procure and apparently did not even read and certainly did not insert in his journal Pinckney's plan or draught. He seems to have felt sadly a certain self-conviction of this, and to have realized the fact that

the omission of the Pinckney draught from his record was an irretrievable error. To a man holding the author of the draught in contempt, it must have seemed preposterous in 1831 for the shade of Pinckney to stalk upon the historic stage and say, I formulated the Constitution. It was my hand that sketched its outline, leaving it to the members of the Convention, myself among the number, to change its provisions and modify its terms. My draught was changed and modified, and the conflicting views of the framers were welded together by notable compromises and persuasive arguments, but nevertheless I contributed more of form and substance, more of detail and language to the instrument known as the Constitution of the United States than any other man.

Accordingly, Madison, while he closed his lips as a witness, rallied his failing forces as an advocate and proceeded to give from time to time first to one correspondent and then to another and finally to the people of the United States, in a "Note" to accompany his Journal when published, all the reasons he could marshal from the written record of the case why

the draught in the State Department was an impossible verity.

At what time the Pinckney draught was first brought to Madison's attention I have not been able to discover; but on the 5th of May, 1830, Mr. Jared Sparks had been spoken or written to on the subject, for he then replied to Madison, writing from Washington, "Since my return I have conversed with Mr. Adams concerning Charles Pinckney's draught of a constitution. He says it was furnished by Mr. Pinckney." Among Madison's papers there is also a memorandum entitled, for Mr. Paulding in which he says:

"Much curiosity and some comment have been exerted by the marvellous identities in a plan of government proposed by Charles Pinckney in the convention of 1787, as published in the Journals with the text of the constitution, as finally agreed to."

This memorandum is not dated, but is placed chronologically before a letter to Mr. J. K. Paulding dated April, 1831.

On the 21st of June, 1831, he wrote to Jared Sparks: "May I ask you to let me know the result of your correspondence with Charles-

ton on the subject of Mr. Pinckney's draught of a Constitution for the United States as soon as it is ascertained?"

On the 27th of June, he again wrote to Mr. Paulding saying that he has "received the volume of pamphlets containing that of Mr. Charles Pinckney."

On the 25th of November, 1831, he again wrote to Mr. Sparks: "The simple question is whether the draught sent by Mr. Pinckney to Mr. Adams and printed in the Journal of the Convention could be the same with that presented by him to the Convention on the 29th May, 1787, and I regret to say that *the evidence that that was not the case is irresistible.*" He instances the election of members of Congress by the people, and the debate of June 6 as "a sufficient example." "But what decides the point" is a letter "from him to me" dated March 28, 1789—a letter quoted by Gilpin of which I shall hereafter speak.

Madison is guarded in all he says, but it is perfectly plain that while he wished to impress upon Paulding and Sparks the idea that the draught which Pinckney placed in the

State Department was not the draught which he presented to the Convention, he at the same time shrank from bringing on a controversy and from irritating the friends of Pinckney and forcing them into an investigation of the matter. It was, he evidently thought, a case of "least said, soonest mended." Madison was a sagacious and an experienced statesman who thoroughly understood his countrymen; Paulding and Sparks were his friends and followers; what he wished to have said passed into Gilpin's edition of the Journal and Elliot's Debates, and gave the unquestioning world what he wished it to know and nothing more. The bridge which he built was safely passed over by the friends of Pinckney and his method of destroying the good name of the draught without needlessly smirching the good name of Pinckney, and without inciting a controversy on the subject has been so successful that for seventy years the draught has remained silently condemned, and no man has even thought that an investigation could possibly reverse the accepted judgment.

But on the 25th of April 1835, William A. Duer of New York wrote to Madison on the

same subject and making the same inquiry. Judge Duer was an eminent and brilliant member of the New York bar and was then President of Columbia College and had been a well known judge. For three years the ghost of Pinckney had not been raised to disturb the serenity of Madison's old age. Paulding and Sparks were his friends and were publicists. To them he could say little which would mean much; and for them his wishes and suggestions would be as binding as a law. Judge Duer was not such a personal friend and to him Madison must speak more freely; he was the possessor of a strong inquiring mind, and to him, Madison must so strongly state the case that it would seem unquestionable. He therefore, with characteristic caution lingered until the 5th of June, and then in his reply to Judge Duer made a supreme, if not final effort.

In this letter, he brings up again, the election of members by "the people" and Pinckney's speech against it on the 6th of June. "Other discrepancies," he says, "will be found in a source also within your reach, a pamphlet published by Mr. Pinckney soon after the close

of the Convention" (Pinckney's Observations). "A friend who has examined and compared the two documents has pointed out the discrepancies noted below." "One conjecture explaining the phenomenon has been that Mr. Pinckney interwove with the draught sent to Mr. Adams passages as agreed to in the Convention in the progress of the work and which after a lapse of more than thirty years were not separated by his recollection."

The "discrepancies noted below" are for the most part unimportant; and will be examined hereafter; but there is one which should be considered now, for it affects Madison more than it affects Pinckney. The discrepancy referred to is this: In the Observations Pinckney says that, "in the best instituted Legislatures of the States we find not only two branches [of the legislature] but in some "a council of revision"; and he adds that he has incorporated this "as a part of the system." The friend says "The pamphlet refers to the following provisions which are not found in the plan furnished to Mr. Adams as forming a part of the plan presented to the Convention: The executive

term of service 7 years. 2. A council of revision."

The statesmen who framed the Constitution were sufficiently statesmen to know that what we call the veto power is not really a veto power; and that the President, unlike the Crown, is not a part of the law-making power. The constitution of New York and not the constitution of Great Britain furnished the framers with the needed model. By all of them it was known that the duty imposed and intended to be imposed upon the President was simply a duty of "revision." This has been a subject of judicial inquiry and the history of the veto provision may be stated in the words of the court:

"At an early day, June 6, this question of legislative power was determined by two decisive votes. The Convention adopted the principle of revision, but being mindful, as Rutledge afterwards said, that 'the judges ought never to give their opinion on a law, till it comes before them,' and that they 'of all men are the most unfit to be concerned in the Revisionary Council,' struck out Ran-

dolph's 'convenient number of the national judiciary' and left the power of revision in the President alone. At a later day, August 6th, Rutledge 'delivered in the Report of the Committee of Detail,' the committee which embodied the previously ascertained views of the Convention in a draught of the proposed Constitution. This section was couched in the very words of the constitution of New York: Every bill shall be presented to the President *'for his revision'*; 'if upon *such revision'* he approve it, he shall sign it; 'if upon *such revision* it shall appear to him improper for being passed into a law,' he shall return it. On the 15th of August, with this word *revision* three times repeated, 'The thirteenth section of article 6, as amended, was then agreed to' by all the States. It is this vote which is expressive of the final intent of the Convention. The verbal form in which the provision stands in the Constitution was the work of the Committee of Style.

"This 'revisionary business,' as Madison calls it, came up again and again; appears and reappears in his Journal from the 6th of June to the 16th of August; was considered and re-

considered, discussed and rediscussed. The views of members swung between the extremes of absolute affirmative power in Congress and absolute negative power in the President. The proposition of Hamilton 'to give the Executive an absolute negative on the laws, 'identical with the legislative power of the Crown, was rejected by ten States and supported by none. The proposition of Madison to add the judges of the Supreme Court in the 'revision' of bills was likewise rejected. At last the deliberations ended where they had begun. The Convention held fast to the principle of a Council of Revision and left the duties of the council in the President alone. He was to be the Council of Revision. In the words of Madison, the Convention 'gave the Executive alone, without the judiciary, the *revisionary control* on the laws, unless overruled by two-thirds of each branch.' '' *The United States v. Weil* (29 Court of Claims Reports 523; affirmed in *La Abra Co. v. The United States,* 175 U. S. R. 423.

Madison forgot that on the 6th of June South Carolina had voted "no" on the motion,

to make "a convenient number of the National judiciary" a council of revision, and that the vote was unanimous; and he forgot that he had written with his own hand only eight days after Pinckney had presented his draught to the Convention:

"Mr. Pinckney *had been at first* in favor of joining the heads of the principal departments, the Secretary of War, of foreign affairs, etc., in the council of revision. He had however *relinquished the idea* from a consideration that these could be called on by the Executive Magistrate whenever he pleased to consult them. He was opposed to an introduction of the judges into the business." Hunt's Writings of Madison, III., pp. 89, 111.

According to Madison there was a discrepancy—more than a discrepancy, a flat contradiction between the Observations and the draught in the State Department, the one saying explicitly that in "some of the best instituted legislatures of the States" there was "a council of revision, consisting of their executive and principal officers of government" and that he had "incorporated it as part of the system"; the other containing no such

provision but, like the Constitution, giving the executive alone the revisionary control of the laws. A superficial examination of the case would easily bring one to the conclusion that Pinckney in 1818 omitted the council of revision from the draught for the State Department and copied from the Constitution the provision which the Convention framed. But the brief speech of Pinckney written down contemporaneously by Madison himself, singularly vindicates both the Observations and the draught and leaves the latter stronger than it would have been if Madison's friend had not furnished "the discrepancies noted below."

The significance of the term "council of revision" was not known to the friend who arrayed the Observations against the draught and may not have been to Judge Duer. Neither did they know that in the judgment and understanding of the Convention the President with powers and duties defined as they were defined was in legal effect the embodiment of the council of revision. But Madison knew it, or had known it. He too had personally participated in the work by

his repeated efforts to engraft a council of revision on the Constitution, and his knowledge he had written down in his own words. Certainly he had no right to attack Pinckney through his unnamed friend. Certainly he had no right to leave Judge Duer to infer that the discrepancies noted below had received his scrutiny and approval. His Journal he knew would be published, he was even then providing for it in his will, and when published it would contradict the discrepancy noted below and sustain the copy of the draught which he was attacking. The obvious explanation is that Madison's failing memory failed to record his own words, "the Convention gave the executive alone, without the judiciary, the revisionary control of the laws," and Pinckney's express declaration as early as the 6th of June that "he had been at first" in favor of a council of revision but for reasons stated had changed his mind.

And let it not be supposed that Madison deliberately intended to deceive or that he was actuated by a malignant wish to deprive Pinckney of any thing which he really believed was actually his due. Madison was

then an old man—a very old man—in his 85th year who had lived long and under the strain of great labors and intense excitements and withering anxieties. He was too old and too weary, and too strongly prejudiced to change his mind in a minute or to reverse the judgment of many years by an investigation de novo.

The word "phenomenon" in his letter to Judge Duer reveals his state of mind and well explains his acts. That the boy who had lodged in the same house with him in Philadelphia, the youngest member of the Convention as he believed, who was always talking about his draught, whom he disliked and underrated, that he should appear in 1818 as the chief contributor to, as the principal draughtsman of the Constitution of the United States was indeed to him a phenomenon. It was something which he could not really believe. There is a note of contrition when he writes that "the length of the document laid before the Convention and other circumstances prevented my taking a copy at the time." He really believed that if he had procured and kept a copy of the draught which Pinckney laid before the

Convention, it would have blown to pieces this wild pretentious claim which he had laid before the Secretary of State.

And Madison made a great mistake when he represented Pinckney to Judge Duer as an old man in 1818 whose waning recollection could not then separate the real from the fictitious in the draught which he had found among his papers in Charleston. For Madison in 1835, when he wrote to Judge Duer, was twenty-five years older than Pinckney was when he sent the draught to Mr. Adams; and twenty-five years at that end of life is no small difference. Moreover his memory from his youth up had been laden and taxed with great events. It was fifty-two years since he had made this despondent note in his record of the debates in Congress:

"Monday, March 17, 1783.

"A letter was received from General Washington, enclosing two anonymous and inflammatory exhortations to the army to assemble, for the purpose of seeking, by other means, that justice which their country showed no disposition to afford them. The steps taken

by the general to avert the gathering storm, and his professions of inflexible adherence to his duty to Congress and to his country, excited the most affectionate sentiments towards him. By private letters from the army, and other circumstances, there appeared good ground for suspecting that the civil creditors were intriguing, in order to inflame the army into such desperation as would produce a general provision for the public debts. These papers were committed to Mr. Gilman, Mr. Dyer, Mr. Clark, Mr. Rutledge, and Mr. Mercer. The appointment of these gentlemen was brought about by a few members, who wished to saddle with this embarrassment the men who had opposed the measures necessary for satisfying the army, viz., the half-pay and permanent funds; against one or other of which the individuals in question had voted.

"This alarming intelligence from the army, added to the critical situation to which our affairs in Europe were reduced by the variance of our ministers with our ally, and to the difficulty of establishing the means of fulfilling the engagements and securing the harmony of the United States, and to the confu-

sions apprehended from the approaching resignation of the superintendent of finance, gave peculiar awe and solemnity to the present moment, and oppressed the minds of Congress with an anxiety and distress which had been scarcely felt in any period of the revolution."

It was 48 years since Madison had served as the most laborious member of the Convention. It was 28 years since he had seen the Navy disgraced by the surrender of the Chesapeake after firing only a single gun—a disgrace caused by the shameful negligence and incapacity of administrative officers at Washington while he was a member of Jefferson's Cabinet. It was 21 years since he had seen the Army disgraced by the negligence of his own Secretary of War and the incapacity of a general of his own choosing, and his Capitol burnt and himself and his Cabinet fugitives, and his heroic wife, her friends and the military guard of "a hundred men all gone," resolutely refusing to leave the Executive Mansion until she had taken "the precious portrait" of Washington from its frame to save it from the ignominy of capture by a British Army. The Pinckney

draught was but a leaf blown aside in the tumults of his troubled life.

But there remains the documentary evidence which Madison adduced and the specification of plagiarism which he filed; and apart from Madison and apart from Pinckney there remains the ultimate question which every student of the Constitution must desire to have examined, and if possible, answered, "What provisions of the Constitution were contributed by Pinckney"?

CHAPTER VI

THE POSITION TAKEN BY MADISON

THE position taken by Madison in private letters to individuals, he had a right to modify, abandon or withdraw; and it would not be treating him fairly to hold him to words hastily written and perhaps inspired by an impulse of the moment. But the "Note of Mr. Madison to the Plan of Charles Pinckney" (Elliot Vol. 5, 578) deliberately prepared by him for future publication, and intended by him to accompany the draught of the State Department in future publications so that it should destroy the supposed verity of the copy, must be taken as the final expression of his judgment.

"Note of Mr. Madison to the Plan of Charles Pinckney, May 29, 1787."

"The length of the Document laid before the Convention, and other circumstances, having prevented the taking of a copy at the time, that which is ["here inserted" stricken out]

inserted in the Debates was taken from the paper furnished to the Secretary of State, and contained in the Journal of the Convention, published in 1819 which it being taken for granted was a true copy was not then examined. The coincidence in several .instances between that and the Constitution as adopted, having attracted the notice of others was at length suggested to mine. On comparing the paper with the Constitution in its final form, or in some of its Stages; and with the propositions, and speeches of Mr. Pinckney in the Convention, it was apparent that considerable errour had crept into the paper; occasioned ["probably" stricken out] possibly by the loss of the Document laid before the Convention, (neither that nor the Resolutions offered by Mr. Patterson, being among the preserved papers), and by a consequent resort for a copy to the rough draught, in which erasures and inter-lineations following what passed in the Convention, might be confounded in part at least with the original text, and after a lapse of more than thirty years, confounded also in the memory of the Author.

"There is in the paper a similarity in some cases, and an identity in others, with details, expressions, and definitions, the results of critical discussions and modifications in the Convention, that ["cannot be ascribed to accident or anticipation" omitted] could not have been anticipated.

"Examples may be noticed in Article VIII. of the paper; which is remarkable also for the circumstance, that whilst it specifies the functions of the President, no provision is contained in the paper for the election of such an officer, nor indeed for the appointment of any Executive Magistracy: notwithstanding the evident purpose of the Author to provide an *entire* plan of a Federal Government.

"Again, in several instances where the paper corresponds with the Constitution, it is at variance with the ideas of Mr. Pinckney, as decidedly expressed in his propositions, and in his arguments, the former in the Journal of the Convention, the latter in the report of its debates: Thus in Art: VIII. of the paper, provision is made for removing the President by impeachment; when it appears that in the Convention, July 20, he was op-

posed to any impeachability of the Executive Magistrate: In Art: III., it is required that all money-bills shall originate in the first Branch of the Legislature; which he strenuously opposed Aug: 8, and again, Aug: 11: In Art: V., members of each House are made ineligible to, as well as incapable of holding, any office under the Union, etc., as was the case at one Stage of the Constitution; a disqualification highly disapproved and opposed by him Aug: 14.

"A still more conclusive evidence of errour in the paper is seen in Art: III., which provides, as the Constitution does, that the first Branch of the Legislature shall be chosen by the people of the several States; whilst it appears, that on the 6th of June, according to previous notice, too, a few days only, after the Draft was laid before the Convention, its Author opposed that mode of choice, urging & proposing, in place of it, an election by the Legislatures of the several States.

"The remarks here made, tho' not material in themselves, were due to the authenticity and accuracy aimed at, in this Record of the proceedings of a Publick Body, so much

an object, sometimes, of curious research, as at all times, of profound interest."

"As an Editorial note to the paper in the hand writing of Mr. M. beginning 'The length, &c.' "

"*Striking discrepancies will be found on a comparison of his plan, as furnished to Mr. Adams, and the view given of that which was laid before the Convention, in a pamphlet published by Francis Childs at New York shortly after the close of the Convention. The title of the pamphlet is ' Observations on the plan of Government submitted to the Federal Convention on the 28th of May, 1787, by Charles Pinckney, &c.'

"But what conclusively proves that the choice of the H. of Reps. *by the people* could not have been the choice in the lost paper is a letter from Mr. Pinkney to J. M. of *March 28, 1789,* now on his files, in which he emphatically adheres to a choice by the *State Legrs.* The following is an extract—'Are you not, to use a full expression, abundantly convinced that the theoretical nonsense of an election of the members of Congress by the people in

the first instance, is clearly and practically wrong—that it will in the end be the means of bringing our Councils into contempt and that the Legislatures (of the States) are the only proper judges of who ought to be elected?' "

It is plain that Madison intended that the last two paragraphs of the foregoing, beginning with an asterisk, should take the form of an editorial note, and he so prepared the paper even to the placing of the asterisk at the beginning. As long before this as 1821 he had determined in his own mind that the publication of the Journal should be as he termed it, "a posthumous one" (letter to Thomas Ritchie September 15, 1821), and he carried out the intention by so providing in his will made in 1835. The expected editor was Mrs. Madison; and she, he knew, would scrupulously and intelligently carry into effect his slightest wish. She was not able to perform the editorial task.

When these charges of Madison are analyzed they may be reduced to three. The first and most serious charge is that there are coincidences "in several instances" between

the draught and the Constitution—"a similarity in some cases and an identity in others with details, expressions and definitions" which were "the results of critical discussion and modification in the Convention." The second is that there are provisions in the draught inconsistent with Pinckney's known views, with the propositions which he presented and the speeches which he made in the Convention and that these provisions are so inconsistent with his views and speeches that they are "conclusive evidence of error" in the draught. The third, is that Pinckney immediately after the sittings of the Convention printed and published a paper entitled "Observations" which described the contents of the draught which he had presented to the Convention and that the two are utterly irreconcilable.

CHAPTER VII

THE PLAGIARISMS

NOTWITHSTANDING Madison's ignorance of the contents of the draught, and the fallacy of the inference which he drew from the fact that Pinckney did not adhere to all the provisions of a tentative scheme, there remains an objection of the gravest character, susceptible of proof or disproof which must rest on facts and not be deduced by inferences. The objection that Pinckney framed a provision at one time and disapproved of it at another is easily superable: the objection that "there is in the paper a similarity in some cases and an identity in others with details, expressions and definitions, the results of critical discussion and modification in the Convention *which could not have been anticipated,*" is insuperable—if it be well founded. That is to say if there are "details, expressions and definitions" in the State Department copy of the draught which were "the re-

sults of critical discussion and modification in the Convention which could not have been anticipated," then the presumption must be well nigh irrefutable that these "details, expressions and definitions" in the questionable instrument were taken from the Constitution; and in the absence of extraordinary explanation, we shall be compelled to agree with Madison that the evidence is "irresistible"—unless indeed it should appear that the expressions and definitions which at first sight appear to have been begun and created in the Convention had previously existed in the Articles of Confederation or in a State Constitution, or in the resolutions of the Continental Congress or in some source open to all parties.

To a right understanding of the circumstances and conditions of the subject of investigation, we must bear in mind, when we begin the inquiry whether there are "details, expressions and definitions" in the Pinckney draught which were "the results of critical discussion and modification in the Convention," that the Constitution passed through four germinal stages:

The first began with Randolph's 15 reso-

lutions, on the 29th of May, and ended on the 26th of July with the 23 resolutions of the Convention. The 15 resolutions had been considered and discussed and modified and expanded into the 19 resolutions of the Committee of the Whole, June 13th; and the 19 resolutions had also been considered and discussed and modified and enlarged into the 23 resolutions of the Convention, July 26th. Never in the history of nations did a deliberative public body strive so philosophically, so wisely and well to possess itself of the subjects to be considered—to comprehend its task—to know what it was doing and to do.

"At the beginning, propositions for consideration and discussion were tentatively placed before the Convention in an *abstract* form. These propositions were embodied in 15 resolutions, which were immediately referred to the Committee of the Whole. They were taken up one by one, and considered and discussed and amended or rejected or adopted or postponed for later consideration. The abstract of a part of a single day's proceedings will give a clear idea of the way in which the Convention worked:

'Tuesday, June 5. Mr. Randolph's *ninth* proposition—*The national judiciary to be chosen by the national legislature*—Disagreed to—*To hold office during good behavior and to receive a fixed compensation*—Agreed to *To have jurisdiction over offenses at sea, captures, cases of foreigners and citizens of different States, of national revenue, impeachment of national officers, and questions of national peace and harmony*—Postponed.

"At the end of two weeks of such consideration and discussion, June 13, the Committee of the Whole reported the conclusions which had so far been reached in the form of 19 resolutions. But everything was still abstract and tentative. No line of the Constitution had yet been written; no provision had yet been agreed upon. The 19 resolutions in like manner were taken up, one by one, and in like manner considered and discussed, and amended or rejected or adopted or postponed. Other propositions coming from other sources were also considered; and so the work went on until July 26, when the conclusions of the Convention were referred to the Committee of

Detail, and the work of reducing the abstract to the concrete began. The Convention then adjourned to August 6, to enable the committee to 'prepare and report the Constitution.'

"On August 6, the Committee of Detail reported and furnished every member with a printed copy of the proposed Constitution. Again the work of consideration began, and went on as before, section by section, line by line. Vexed questions were referred to committees representing every State,—"grand committees" they were called,—amendments were offered, changes were made, the Committee of Detail incorporated new and additional matters in their draught, until, on September 8, the work of construction stopped. But not even then did the labors of the Convention cease. On that day a committee was appointed, "by ballot, to revise the style of, and arrange, the articles which had been agreed to." This committee was afterward known as the Committee of Style. It reported on the 12th of September, and the work of revision again went on until Saturday, the 15th. On Monday, the 17th, the end was reached, and the members of the Convention

signed the Constitution. Well might Franklin exclaim in his farewell words to the Convention: 'It astonishes me, sir, to find the system approaching so near to perfection as it does!' He had been overruled more than once in the Convention; provisions which he had proposed had been rejected; provisions which he had opposed had been retained; but he was a great man and saw that a great work had been accomplished." The Immutability of the Constitution. Encyclopædia Americana.

The second germinal stage began July 26th with the appointment of a committee—the Committee of Detail "for the purpose of reporting a Constitution," and continued until August 6th when "Mr. Rutledge delivered in the report of the Committee of Detail—a printed copy being at the same time furnished to each member."

The Committee had retired from the Convention with instructions couched in the 23 resolutions, and they returned to it with more than half of the Constitution, arranged in the form of articles and sections substantially as

we have them in the Constitution. The number of provisions contained in the draught greatly exceeded the number of specific instructions set forth in the resolutions, but the excess was not wholly an excess of authority for it had been resolved :

"That the national legislature ought to possess the legislative rights vested in Congress by the Confederation: and moreover to legislate in all the cases for the general interests of the Union, and also in those to which the States are separately incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

When the paper which Rutledge held in his hand, as he rose to address the Convention on the 6th of August, was placed on the table before Washington, the moment witnessed the birth of the Constitution. Provisions which it contained were to be stricken out, and some of the great compromises were yet to be forged and inscribed upon the scroll, but the written Constitution was now in being. And yet this is but figurative language. The great state paper which passed from the hand of Rut-

ledge to the hand of Washington was not engrossed on parchment, like a second Magna Charta; it was not attested by signature or date; it was not even in writing; a few pages of printer's paper, plain and unpretentious; a mere copy, one of a number of printed copies, as we gather from the record. But it was to receive the severest scrutiny of some of the great men of the world, of Washington, Franklin, Madison, Ellsworth, Wilson, Rutledge, Hamilton.

The printed document found in the box which holds the few records of the Convention is not unworthy of a great state paper. It is on stately, heavy, hand-made paper, 10 by 15½ inches in size. The printed matter is 5¼ inches by 12½. There are seven pages carrying from 27 to 53 lines on each. The workmanship is faultless; the type clear, the impression uniform, the ink unfaded, the punctuation careful, the spacing perfect. There are but two typographical errors, one of which is a misnumbering of the articles. In Pinckney's draught the first article has inscribed over it "Article 1" and the following articles have only their numbers 2, 3, etc. The prin-

ter followed the same form, the only difference being that Pinckney, writing the draught with his own hand, used arabic figures, for which the printer substituted Roman numerals. When he reached the seventh article he repeated VI. and when he reached the eighth he entitled it VII. and continued the error through the remaining articles. Notwithstanding this blemish I have never seen so faultless a public document.

The copy bears this endorsement:

"Printed Draught of the Constitution, received from the President of the United States, March 19th, 1796 by

"TIMOTHY PICKERING

"Sec'y of State"

The name of the printer who did his confidential work so well, I regret to say, is not upon the paper.

It has been supposed and said that this copy of the draught was Jackson's, the inefficient Secretary of the Convention, and that he used it to save himself the trouble of writing out the proceedings in the journal by not-

ing amendments on the margin. This like much other imaginary history is erroneous.

When I first saw the draught of the committee, I observed that the notes on the margin were written in two different hands. I also observed that one of these though not familiar was a hand which I had seen before. On calling the attention of Mr. S. B. Crandall of the Bureau of Rolls to it, he instantly recognized this writing as Washington's. A further examination showed that 115 notes and interlineations were written by Washington and 7 by Jackson. *This copy of the draught was Washington's own copy!*

Whether he placed the copy among the papers of the Convention on September 17, 1787 when the Secretary brought them to him; or whether he transferred his own copy to the Secretary of State in 1796 is unknown and probably unascertainable, but the indorsement makes it certain that the paper came to the Department directly from Washington; and the 115 carefully made emendations in his handwriting are for us the highest evidence in the world of its authenticity.

The notes by Jackson are easily explicable;

they are lengthy amendments which Washington could not take down from hearing them read; and he handed his printed copy to the Secretary to have them correctly and fully written out.[1]

If the Committee of Detail—Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut and Wilson of Pennsylvania—intended to keep their work a profound secret, and the secret to be buried with themselves, they could not have planned better than they did. The work was done in secret; they employed no secretary; their report was not in writing. After the committee was discharged no hint or word seems to have escaped them. No man boasted of his own part or disparaged another's. There is no journal which tells us how they worked. No son or daughter or grandchild has revealed a word that any member subsequently said. In 1813 when Ed-

[1] For the benefit of those persons who are so fortunate as to have a copy of the Documentary History of the Constitution (Department of State, 1894) I will add that the marginal notes which are in the writing of Jackson are those of Art. V, Sec. 1; Art. VI, Sec. 3; Sec. 13, Art. VII; Sec. 1, Art. XI; Sec. 4, Art. XV; (see Doc. Hist., Constitution Vol. I, p. 285).

mund Randolph died, the secret of the members of the Committee of Detail died with him.

The third germinal stage was based on the draught of the Committee of Detail and extended from the 6th of August to the 12th of September. The draught of the Committee constituted the divide in the march of the framers. Behind them was the plain of philosophical disquisition on which there had been many contests, but exclusively as to what might be and might not be. Before them were many hills of difficulty to be surmounted in the practical application of abstract propositions by incorporating them in provisions and conditions to be written into the Constitution. But the work of the Convention and the debates of the members were in connection with the draughted Constitution of the Committee of Detail, or in connection with amendments thereof or additions thereto. There were indeed new provisions framed sometimes by grand committees, sometimes by special committees, sometimes by the Convention itself — provisions concerning which the Convention had not at first suffi-

ciently instructed the Committee of Detail—provisions which the Convention had not then considered and determined even in the form of abstract propositions. The most difficult of the compromises, that between the large and the small States in the choosing of the President, was effected; and the method first proposed by Wilson and rejected by the Convention, June 2nd, that the choice should be made through the agency of electoral colleges was reconsidered and adopted. The power to try officers impeached by the House of Representatives was taken from the Supreme Court and given to the Senate; the power to appoint ambassadors, and judges of the Supreme Court, was taken from the Senate and given to the President; the power to appoint the Treasurer of the United States was taken from the Legislative branch and given to the Executive; and the important treaty-making power which at first was lodged exclusively in the Senate was transferred to the Executive subject to the ratification of the Senate. But all that was considered and agreed upon was attached to the draught of the Committee of Detail.

THE PINCKNEY DRAUGHT

The fourth stage began on the 12th of September with the revised Constitution reported by the Committee appointed "to revise the style of and arrange the articles" which had been agreed upon, commonly termed the "Committee of Style," but which more correctly might have been termed the Committee of Revision. During that and the next three days the Constitution was modified by a number of amendments chiefly of the nature of corrections. The Committee of Style made no changes other than those of arrangement and language. The correction of the language of the Constitution was masterly and is ascribed by Madison to Gouverneur Morris. On Saturday the 15th of September the labors of the Convention ended. On Monday the 17th, the engrossed Constitution was signed.

In his "Note to the Plan," Madison specifies some of the "details, expressions and definitions" which were framed in the Convention, the "results of critical discussions" that "could not have been anticipated" by Pinckney. "Examples" of these "similarities" and "identities" he says, "may be noticed in article VIII, which is remarkable also

for the circumstance that whilst it specifies the functions of the President, no provision is contained in the paper for the election of such an officer." These are all the specifications of provisions or of language plagiarised from the Constitution by Pinckney which Madison has filed. Specifying nothing else, we may assume that the plagiarisms contained in article VIII. were the plagiarisms which dwelt in his own mind and upon which he rested his conclusions.

These specific charges of plagiarism may be struck down by a single blow:—

Not one of the provisions contained in Pinckney's article VIII was framed in the Convention, and all were brought before the Convention by the draught of the Committee of Detail. All the provisions of the Constitution which were framed by the Convention were framed subsequently to the 6th of August and belong to the 3d and 4th germinal periods. All the provisions which are contained in the draught of the Committee of Detail were framed before the 6th of August and existed before the constructive work of the Convention began.

THE PINCKNEY DRAUGHT

When the sequence of events is observed the matter is cleared and the "phenomenon" of Madison becomes a simple link in the chain of events. Pinckney presented his draught to the Convention on its first business day before there had been a single "critical discussion." The Convention immediately referred the draught to the Committee of the Whole, which made it accessible to every member of the Convention. When a committee was appointed to draught a Constitution, the draught of Pinckney was taken from the Committee of the Whole and referred to the Committee of Detail. The committee found in the draught matter which they needed and they used it as the basis of their own draught as any committee would have done. And thus the draught of the Committee of Detail became the vehicle by means of which these provisions and expressions of Pinckney were carried into the Constitution.

If all this were not a matter of record it would be well nigh unbelievable that Madison of all men could have pursued the course he did. The most diligent member of the Convention, the chronicler of its transactions, the

sole survivor of its members and, consequently, a witness who should speak with the greatest care; and yet we find him, at one end of the line, ignorant of the contents of Pinckney's draught, and at the other silent as to the contents and existence of the draught of the Committee of Detail. When he wrote of "the coincidence in several instances between that [the State Department draught] and the *Constitution as adopted*" and cited article VIII as containing remarkable examples of these coincidences, he gave unconsciously a curious illustration of things "confounded in the memory" "after a lapse of more than thirty years"—in his case, after a lapse of more than forty-five years.

With the fall of these specifications falls the general charge of plagiarism. The draught in the State Department ends with the draught of the Committee of Detail; whatever coincidences there be of "details, expressions and definitions" are coincidences in the two draughts and in them alone. The similarities and identities which so impressed Madison were merely similarities and identities between the two draughts. He doubtless selected arti-

cle VIII as "remarkable" because he recognized in it provisions and expressions which he knew were in the Constitution. But there are others in article VIII which are not in the Constitution and which are inconsistent with it. The retention of these is sufficient to refute the idea that Pinckney changed his draught to make it conform to the work of the Convention. Article VIII provides that the title of the President "shall be his Excellency." There is no such provision in the Constitution. Article VIII makes exceptions to the appointing power; "ambassadors, other ministers and judges of the Supreme Court" are not to be appointed by the President but by the Senate. This was not one of the "results" arrived at in the Convention. In case of the death of the President and the death of the President of the Senate, "the Speaker of the House of Delegates shall exercise the duties of the office." Here all that Pinckney had to do to make his draught conform was to run his pen through the supplementary clause vesting the succession in the Speaker. The President may be removed from office on impeachment by the House of Delegates and "conviction in the

Supreme Court." Here all that Pinckney had to do was to erase "Supreme Court" and insert "Senate." Finally it is to be noted that those expressions and provisions in article VIII which caught the eye of Madison and were characterized as "remarkable" were not "results of critical discussion and modification in the Convention that could not have been anticipated," but were provisions and expressions which had been taken by Pinckney from the constitutions of New York and Massachusetts, generally word for word. The article provides that the President "shall from time to time give information to the legislature of the state of the Union," and "recommend to their consideration" the measures he may think necessary; that "he shall take care that the laws be duly executed"; that "he shall commission all officers"; and "shall nominate and with the consent of the Senate" appoint officers; that "he shall have power to grant pardons and reprieves"; and that "he shall be commander in chief of the army and navy"; but each of these provisions was taken from the constitution of New York. The article also provides that at "entering on the duties

of his office he shall take an oath faithfully to execute the duties" of President; and that he "shall be removed from his office on impeachment by the House of Delegates"; but these provisions were taken from the constitution of Massachusetts. The article also provides that "in case of his removal by death, resignation or disability, the President of the Senate shall exercise the duties of his office"; but this is taken from the constitution of New York. In a word when we trace these provisions and expressions to their respective sources there is nothing left of the article. Article VIII is indeed remarkable; but it is for reversing the deductions of Madison; for demonstrating with mathematical certainty (so far as it goes), that Pinckney did not make his draught conform to "results" which had been reached in the Convention, and which "could not have been anticipated."

CHAPTER VIII.

THE IMPROBABILITIES.

THE most incisive reason given by Madison against the authenticity of the draught in the Department of State, the reason which he most reiterated, if not the one upon which he most relied, was that the draught was presented to the Convention on the 29th May and a week later, June 6th, Pinckney moved "that the first branch of the national legislature be elected by the State legislatures and not by the people." This objection is not only plausible but it rests on two incontrovertible facts each of which is a matter of record—that the draught was presented to the Convention on the 29th of May; that his inconsistent motion was made on the 6th of June. But the conclusiveness of these facts disappears when the circumstances and changed conditions of the case appear.

In the first place Pinckney had forestalled the point made by Madison by declaring in

his letter to the Secretary of State that there were provisions in the draught which on further reflection he had opposed in the Convention. This declaration, it must be remembered, was made before the publication of Madison's Journal, before it was known that it would be published, before Pinckney knew or could have known what the Journal would show. In other words it was he himself who first revealed his own inconsistency in having presented a plan for one thing in May and in having contended for another thing in June. The explanation is not an after-thought or a defence, but an avowal made in due time.

In the second place the draught was presented on the 29th of May, but it was not written then. It must have been written weeks before this in Pinckney's study in Charleston. When he wrote it he had before him, as every American of that day had, the Constitution of Great Britain, the constitution under which he had grown up, the merits and virtues and wisdom and excellencies of which he had read and re-read in Blackstone. It was a matter of course for him, when dealing with the legislative power, to have his Congress consist of two

houses. As to this there would not be a doubt or a thought. The next thing would be to have the members of the first house, like the members of the House of Commons, elected by the people. So far he had no reason to pause and reflect. But when he came to the second house, he had no nobility at hand of which it might be composed. Here his invention began, and he avowedly so contrived his Senate that it should in fact though not in form, represent not nobility but wealth. It is probable that when he was draughting his constitution, it never entered his head that the lower house of the American parliament could be chosen by any other means than the means by which the House of Commons was chosen and the lower house of every American State.

In the third place between the 29th of May and the 6th of June the subject had come before the Convention and had been discussed and South Carolina had taken a position against it.

Gerry of Massachusetts said that "the evils we experience flow from the excess of democracy"; and that "he did not like the election by the people." Butler, of South Carolina,

"thought an election by the people an impracticable mode." Rutledge, the strongest man in the State, seconded the motion to have the first branch elected by the State legislatures. Charles Cotesworth Pinckney, the most esteemed citizen of the State and Pinckney's kinsman, brought South Carolina before the Convention as an illustration and even went so far as to say "an election of either branch by the people, scattered as they are in many States, particularly in South Carolina, is totally impracticable."

Pinckney was the youngest member of the delegation—much the youngest. He was not yet 30; and, with the exception of Dayton and Mercer was the youngest member of the Convention. It would have been natural for him as a Southerner "to go with his State"—and as a young man to defer to his seniors. And after hearing the debate on the 31st of May and the reasons of his fellow delegates from South Carolina, it was proper for him to change his mind and advocate election by the State legislatures as a better mode. It would have been a matter of wonder if he had not!

But there is a letter of George Read which should be considered, for it suggests the question whether this change of Pinckney did not take place before the 29th of May; that is to say before he presented his draught to the Convention.

On the 20th of May 1787 Mr. Read wrote from Philadelphia to John Dickinson:

"I am in possession of a copied draught of a federal system intended to be proposed if something nearly similar shall not precede it. Some of its principal features are taken from the New York system of government. A house of delegates and senate for a general legislature, as to the great business of the Union. The first of them to be chosen by the legislature of each State, in proportion to its number of white inhabitants, and three-fifths of all others, fixing a number for sending each representative. The second, to-wit the senate, to be elected by the delegates so returned, either from themselves or the people at large, in four great districts, into which the United States are to be divided for the purpose of forming this senate from which, when so formed, is to be divided into four classes for the purpose of

an annual rotation of a fourth of the members. A president having only executive powers for seven years." (Read's Life of George Read of Delaware p. 443.)

This letter is very far from being conclusive. In the first place it does not appear that Mr. Read had seen the original of this "copied draught" or that Pinckney had given him the copy or had told him what his plan was or that any person who had seen the original draught had told him what it contained. In the second place the existence of an unauthenticated copy on the 20th of May does not conclusively prove that a different version of the same draught was not presented to the Convention on the 29th of May. Still this letter undoubtedly refers to Pinckney's draught and compels a more searching examination of the question raised than would otherwise be necessary.

In a paper which will be called, briefly, "the Observations" written by Pinckney before he left Charleston he sets forth at length a description of his plan of government. In the opening paragraph of this paper he says that he will "give each article" of his draught "that either materially varies" from the pres-

ent government "or is new." He then goes on to say that "the first important alteration is that of the principle of representation." "Representation is a sign of the reality. Upon this principle, however abused, the Parliament of Great Britain is formed, and it has been universally adopted by the States in the formation of their legislatures." This is all which Pinckney, writing before the Convention began its work, had to say concerning the lower house of Congress. His Senate was new and concerning it he had much more to say, and he described it. But of the lower house, the popular body, he had nothing to say save that there would be such a house, and that it would rest upon the principle of representation "universally adopted by the States in the formation of their legislatures." The Virginia resolutions undoubtedly expressed the opinion of substantially all Americans when they said, "Resolved that the members of the first branch of the national legislature ought to be elected by the people of the several States." Assuredly if the draught which Pinckney was then describing had contained the extraordinary and novel proposition that the popular branch of

the national legislature, the body which should represent the people, was not to be chosen by the people he would have had something "new" to lay before the Convention—something which did not exist in the government of any English speaking people in the world—something which "materially varied" from the belief and usage and history and traditions of the people who were to ordain this Constitution. Knowing Pinckney as we do—his general views, his adherence to the general principles of the British constitution, his attentive study of State constitutions, his outspokenness, his belief in his own devices, we know that if his draught had then contained so radical a departure from all existing constitutions as that which he subsequently proposed in the Convention, and if he had worked himself into a belief at the time when he wrote the Observations that the election of their representatives by the people was "theoretical nonsense", he could not have refrained from saying so. What is said in the Observations harmonized with the constitutions of every State in the Confederation and with the Virginia resolutions and with the views of every mem-

ber of the Convention excepting the five great land owners from South Carolina.

The Observations, therefore (written before the Convention and published afterwards), sustain the draught in the State Department.

The words "the people" appear directly and necessarily in article 3 of the draught: "The Members of the House of Delegates shall be chosen every—— year by the people of the several States; and the qualifications of the electors shall be the same as those of the electors in the several States for their Legislatures." They reappear casually and needlessly in article 5: "Each State shall prescribe the time and manner of holding elections *by the people* for the House of Delegates." The draught therefore in these provisions is consistent with itself.

In the draught of the Committee of Detail the words of Pinckney's article 3 again appear with some amplification, but in the same order with the same context and with the same intent. Such agreements come not by chance.

And if such agreements come not by chance, could Pinckney while he was copying the committee's draught for his own article 3 have

written these two troublesome words "the people" without taking heed of their significance, without realizing what he was doing, without remembering that his own draught had said "the *legislatures* of the several States." He could not! For there is another provision in the draught in the State Department which was not taken from the committee's draught—which did not exist in the committee's draught—which must have been deliberately framed by Pinckney—the provision before quoted from article 5, "Each State shall prescribe the time and manner of holding elections *by the people* for the House of Delegates." That is to say if Pinckney unintentionally abstracted his article 3 from the committee's draught in 1818, he, nevertheless, must have fabricated designedly his article 5 at the same time; for there is nothing in the committee's draught to suggest it.

Then the question immediately arises, What motive could Pinckney have had for falsifying his draught and making this change from the election of delegates by State legislatures to their election by the people of the several States. The answer of the superficial of

course will be, "So that the world should believe that he had always been in favor of the election of representatives by the people." No other reason can well be assigned; yet there could not have been such a motive. Pinckney knew that his draught was to be soon published and that with it would be published the official Journal of the Convention and that the publication would disclose to the world this record:

"Wednesday, June 6, 1787

"Mr. Gorham in the Chair.

"It was moved by Mr. Pinckney, seconded by Mr. Rutledge to strike the word 'people' out of the 4th resolution submitted by Mr. Randolph, and to insert in its place the word

'Legislatures' so as to read 'resolved that the Members of the first branch of the national legislature ought to be elected by the Legislatures of the several States'

"and on the question to strike out

"it passed in the negative."

If Pinckney's article 3 had really provided that members of the first house should be chosen *by the legislatures* of the several States, cer-

tainly his article 5 would not have provided that "each State shall prescribe the time and manner of holding elections by *the people.*" Article 3 laid down the basic principle that representatives were to be chosen by the people, and article 5 provided for the time and manner when and whereby the people should elect their representatives; and article 4 provided that Senators should be chosen, not by the people or the legislatures of the several States, but by the House of Delegates. In all these provisions we again see that the draught in the State Department is consistent with itself.

It is possible that the person who gave the "copied draught" to Mr. Read was Pinckney himself; and it is probable that by the 20th of May he had changed his mind concerning the election of delegates by the people and had determined to make his draught conform to the views of his fellow delegates from South Carolina. We know, as will hereafter appear, that he contemplated making many amendments to his draught before presenting it to the Convention; and that he hastily and prematurely presented it on the 29th of May so that it should

go with the Virginia resolutions to the Committee of the Whole. The change we are considering may not have been made in the written instrument which he laid upon the Secretary's desk, though he made the change in his own mind. But be that as it may, it is as certain as existing knowledge goes that no man saw the original draught with the words "by the people" twice stricken out and the words "by the legislatures of the several States" twice written in; and until this change in the original draught is shown by positive testimony, unequivocal in terms and above suspicion in character, the circumstantial evidence that the draught went to the Convention with the words "the people" in the 3d and 5th articles is overwhelming.

There are some other things specified in the Note not of great importance, but which serve to show how eagerly Madison clutched at anything that would operate as a makeweight against Pinckney and his draught.

Article VIII "is remarkable also for the circumstance that whilst it specifies the functions of the President, no provision is contained in the paper for the election of such an officer."

This is not a complete statement of the case. The article declares that "the executive power" shall be vested in a President and that "he shall be elected for —— years." The provisions relating to the President were on their face incomplete. There are virtually two blanks left in the provision, the one relating to the length of the President's term of office, the other to the manner in which he should be chosen. The 12th resolution filled these blanks for a time by saying "seven years" for the one and by "the National legislature" for the other. Here were "results" arrived at in the Convention. That Pinckney did not fill these blanks in the Department copy—blanks so obvious and so easily filled—goes a great way to show that he did not in any place complete his draught by writing into it "results" arrived at in the Convention. It is a strained, artificial conclusion which calls an omission "remarkable" when the instrument is avowedly nothing but an incomplete, tentative draught prepared for the future consideration of its author as well as other persons.

Madison notes "variances" between the draught in the Department and the proposi-

tions and arguments of Pinckney in the Convention. "Thus in article VIII" he says, Pinckney provides for the impeachment of the President but on the 20th of July he was opposed to "any impeachability of the Executive." "He was sure they *ought not to issue from the legislature who would in that case hold them as a rod over the Executive.*" But the draught says much more than Madison repeats. "He shall be removed from his office on impeachment by the House of Delegates *and conviction in the Supreme Court.*" Pinckney did not oppose *that* in the Convention. Madison on his own record clearly had no right to say that Pinckney "was opposed to any impeachability of the Executive." He did not oppose such an impeachability as his draught provided for viz., by the Supreme Court, and his reasons quoted by Madison do not apply to the impeachability provided in his draught.

"In article III it is required that all money-bills shall originate in the first branch of the legislature; which he strenuously opposed on the 8th of August and again on the 11th." Here Madison overlooked the significance of these dates. They are subsequent to the report

of the Committee of Detail by which report Pinckney's plan for the organization of the Senate had been rejected. Pinckney alluded to this on the 11th when he said, "The rule of representation in the first branch was the true condition to that in the second branch." Neither does it appear in Madison's Journal that he "*strenuously* opposed." On the 11th he "was sorry to oppose reopening the question," but "he considered it a mere waste of time." On the 8th his opposition had been couched in three lines, "If the Senate can be trusted with the many great powers proposed, it surely can be trusted with that of originating money-bills." Pinckney's real position in regard to this was clearly stated by himself and thus recorded by Madison on Wednesday, June 13th; "Mr. Pinckney thinks the question premature. If the Senate should be formed on the same proportional representation, as it stands at present, they should have equal power. Otherwise a different principle should be introduced." How did the Senate "stand at present," on June 13th. This is shown by the resolutions of the Committee of the Whole of the same day. "That the right of suffrage in the

second branch of the national legislature ought to be according to the rule established for the first branch." Resolution 8. The Senate therefore was "at present," a very different representative body than the Senate of Pinckney's draught; and to say on these changed conditions and on the record of what he did say that he "strenuously opposed" the very thing which he had adopted in his draught is a wild use of terms.

"In article V, members of each house are made ineligible to as well as incapable of holding any office" a provision, Madison continues, which "was highly disapproved of by him on the 14th of August."

What was this disapproval? Article V provides that the members of each house shall not be eligible to office during the time for which they have been respectively elected, "nor the members of the Senate for one year after." This idea that a member of Congress should not hold, during his legislative term of office, an executive office which he had helped to create or the emoluments of which he had helped to increase, undoubtedly existed in many minds. But under the scheme embodied in the

Pinckney draught there was a peculiar reason why the ineligibility of Senators should continue after their legislative terms of office had expired. That reason was because (Art. VIII), the Senate was to be an appointing power. It was to "have sole and exclusive power to" "appoint ambassadors, and other ministers to foreign nations, and judges of the Supreme Court." Under this scheme it was obvious that a Senator should not be allowed to step out of office at the expiration of his term on one day and be appointed by his late colleagues to an important office on the next day. It is, therefore, not a surprising thing to find this provision in the draught and to find it applied only to the Senate.

On the 14th of August Pinckney had so far modified his own views that he was then in favor of making the members of each House incapable of holding executive salaried offices while they continued members, with a provision that "the acceptance of such office shall vacate their seats respectively." This having failed in Convention, he on the same day urged a general postponement of the subject "until it should be seen what powers should be vested

in the Senate" "when," he said, "it would be more easy to judge of the expediency of allowing officers of State to be chosen out of that body." This postponement was agreed to nem. con. It is manifest that the idea of the Senate being an appointing power was still uppermost in his mind. He gave good reasons for not making ineligibility absolute; but he consistently adhered to the idea that the same person should not be both a Legislator and an officer of State.

On the 14th of August Pinckney proposed to make members ineligible to hold any office by which they would receive a salary. This was merely a restriction on the original proposition of the draught, a limiting of its application to salaried offices but leaving members eligible and capable of filling honorary positions. To say that his original proposition was thereby "highly disapproved" by him is certainly an abuse of the term "highly disapproved." The objection of Madison when tested by his own record, the Journal, comes down to this: that three months or more after Pinckney wrote the draught, he thought it better to limit the Constitutional prohibition to

"salaried offices." This restriction was a trivial and a sensible modification. To infer from it that Pinckney then "highly disapproved" his own original proposition merely marks the nervous excitement which seems to have impelled Madison to exaggerate every little deviation of Pinckney from the strict letter of his draught into conclusive evidence that this draught never existed.

This brings us to the extrinsic evidence on which Madison relied, the testimony of Pinckney against himself.

CHAPTER IX.

THE OBSERVATIONS

THE Observations of Pinckney, in Madison's estimation, fully sustained his arguments and justified his attacks on the verity of the draught in the State Department. The publication so entitled is a small pamphlet of 27 pages. It has the following title page:

Observations

on the

PLAN OF GOVERNMENT

Submitted to the

FEDERAL CONVENTION

in Philadelphia on the 28th of May, 1787

By Mr. Charles Pinckney

Delegate from the State of South Carolina

DELIVERED AT DIFFERENT TIMES

IN THE COURSE OF THEIR DISCUSSIONS.

New York. Printed
by Francis Childs
105

Two copies of this are in the library of the New York Historical Society, and it is reprinted in Moore's American Eloquence. It bears no date, but we learn from Madison's letter to Washington (before quoted) that it must have been published before the 14th of October, 1787; that is to say immediately after the dissolution of the Convention on the 17th of September.

Madison unquestionably relied upon this pamphlet as containing the highest evidence against the verity of the draught in the State Department. The anxiety which he showed to obtain it, and the care with which he brought it to the attention of those who were or who in the future might be interested in the matter make it plain that he regarded the Observations as a conservatory of admissions which Pinckney would not deny if he were living, and which his friends could not controvert now that Pinckney was dead.

The first record we have of Madison's reliance on this pamphlet is a memorandum found among his papers which bears no date but which must have been written prior to April 6th, 1831.

THE OBSERVATIONS

"FOR MR. PAULDING"

"Much curiosity and some comment have been exerted by the marvellous identities in a plan of Government proposed by Charles Pinckney in the Convention of 1787 as published in the Journals with the text of the Constitution, as finally agreed to. I find among my pamphlets a copy of a small one entitled Observations on the Plan of Government submitted to the Federal Convention, in Philadelphia, on the 28th of May, by Mr. C. Pinckney, a Delegate from S. Carolina, delivered at different times in the Convention.

"The copy is so defaced and mutilated that it is impossible to make out enough of the plan, as referred to in the Observations, for a due comparison of it with that printed in the Journal. The pamphlet was printed in N. York by Francis Childs. The year is defaced. It must have been not very long after the close of the Convention, and with the sanction, at least, of Mr. Pinckney himself. It has occurred to me that a copy may be attainable at the printing office, if still kept up, or in some of the libraries or historical collections in the

city. When you can snatch a moment, in your walks with other views, for a call at such places, you will promote an object of some little interest as well as delicacy, by ascertaining whether the article in question can be met with. I have among my manuscript papers lights on the subject. The pamphlet of Mr. P. could not fail to add to them.

"April, 1831."

At some time subsequent to the 6th of April he wrote to Mr. Paulding, saying that in a previous letter "I requested you to make an inquiry concerning a small pamphlet of Charles Pinckney printed at the close of the Federal Convention of 1787;" and on the 6th of June he again wrote to Mr. Paulding,

"June 6th, 1831.

"DEAR SIR.—Since my letter answering yours of April 6th, in which I requested you to make an inquiry concerning a small pamphlet of Charles Pinkney printed at the close of the Federal Convention of 1787, it has occurred to me that the pamphlet might not have been put in circulation,

but only presented to his friends, etc. In that way I may have become possessed of the copy to which I referred as in a damaged state. On this supposition the only chance of success must be among the books, etc., of individuals on the list of Mr. Pinckney's political associates and friends. Of those who belonged to N. York, I recollect no one so likely to have received a copy as Rufus King. If that was the case, it may remain with his representative, and I would suggest an informal resort to that quarter, with a hope that you will pardon this further tax on your kindness."

On the 27th of June he wrote to Mr. Paulding for the third time regarding the Observations:

"June 27th, 1831.

"Dear Sir:—With your favor of the 20th instant I received the volume of pamphlets containing that of Mr. Charles Pinckney, for which I am indebted to your obliging researches. The volume shall be duly returned, and in the mean time duly taken care of. I have not sufficiently examined the pamphlet in question, but I have no doubt that it throws light on the subject to which it has relation."

On the 25th of November he wrote at length to Jared Sparks setting forth all his objections to the draught and added: "Further discrepancies might be found in the observations of Mr. Pinckney, printed in a pamphlet by Francis Childs, in New York, shortly after the close of the Convention. I have a copy too mutilated for use, but it may probably be preserved in some of your historical repositories."

On the 5th of June 1835 he wrote to Judge Duer: "Other discrepancies will be found in a source also within your reach, in a pamphlet published by Mr. Pinckney soon after the close of the Convention, in which he refers to parts of his plan which are at variance with the document in the printed Journal. A friend who has examined and compared the two documents has pointed out the discrepancies noted below."

Then follows the list of discrepancies "pointed out" by "a friend"; and in this letter he refers Judge Duer to the Library of the Historical Society of New York as the place where a copy of the Observations can be found.

THE OBSERVATIONS

The following paragraphs from the Observations contain all that bears upon the contents of the draught, and all upon which Madison relied.

"There is no one, I believe, who doubts there is something particularly alarming in the present conjuncture. There is hardly a man in or out of office, who holds any other language. Our Government is despised—our laws are robbed of their respected terrors—their inaction is a subject of ridicule—and their exertion, of abhorrence and opposition—rank and office have lost their reverence and effect—our foreign politics are as much deranged, as our domestic economy—our friends are slackened in their affection, and our citizens loosened from their obedience. We know neither how to yield nor how to enforce—hardly any thing abroad or at home is sound and entire—disconnection and confusion in offices, in States and in parties, prevail throughout every part of the Union. These are facts universally admitted and lamented."

"Be assured that however unfashionable for the moment your sentiments may be, yet,

if your system is accommodated to the situation of the Union, and founded in wise and liberal principles, it will in time be consented to. An energetic government is our true policy, and it will at last be discovered and prevail."

"Presuming that the question will be taken up de novo, I do not conceive it necessary to go into minute detail of the defects of the present confederation, but request permission to submit, with deference to the House, the draught of a government which I have formed for the Union. The defects of the present will appear in the course of the examination. I shall give each article that either materially varies or is new. I well know the science of government is at once a delicate and difficult one, and none more so than that of republics. I confess my situation or experience have not been such as to enable me to form the clearest and justest opinions. The sentiments I shall offer are the result of not so much reflection as I could have wished. The plan will admit of important amendments. I do not mean at once to offer it for the consideration of the

House, but have taken the liberty of mentioning it, because it was my duty to do so.

"The first important alteration is that of the principle of representation and the distribution of the different powers of government. In the federal councils, each State ought to have a weight in proportion to its importance; and no State is justly entitled to greater. A representation is a sign of the reality. Upon this principle, however abused, the Parliament of Great Britain is formed, and it had been universally adopted by the States in the formation of their legislatures."

"In the Parliament of Great Britain as well as in most and the best instituted legislatures of the States, we find not only two branches, but in some a council of revision, consisting of their executive and principal officers of government. This I consider as an improvement in legislation, and have therefore incorporated it as a part of the system.

"The Senate, I propose to have elected by the House of Delegates, upon proportionable principles, in the manner I have stated, which though rotative, will give a sufficient de-

gree of stability and independence. The districts, into which the Union is to be divided, will be so apportioned as to give to each its due weight, and the Senate, calculated in this, as it ought to be in every government, to represent the wealth of the nation.

"The executive should be appointed septennially, but his eligibility ought not to be limited: He is not a branch of the legislature farther, than as a part of the council of revision; and the suffering him to continue eligible will not only be the means of ensuring his good behavior, but serve to render the office more respectable.

"The 4th article, respecting the extending the rights of the citizens of each State throughout the United States; the delivery of fugitives from justice upon demand, and the giving full faith and credit to the records and proceedings of each, is formed exactly upon the principles of the 4th article of the present confederation, except with this difference, that the demand of the Executive of a State for any fugitive criminal offender shall be complied with. It is now confined to treason, felony, or other high misdemeanor; but as

there is no good reason for confining it to those crimes, no distinction ought to exist, and a State should always be at liberty to demand a fugitive from its justice, let his crime be what it may.

"The 5th article, declaring that individual States shall not exercise certain powers, is also founded on the same principle as the 6th of the confederation.

"The next is an important alteration of the Federal system, and is intended to give the United States in Congress, not only a revision of the legislative acts of each State, but a negative upon all such as shall appear to them improper.

"I apprehend the true intention of the States in uniting is, to have a firm, national government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign State. The members which compose the superintending government are to be considered merely as parts of a great whole, and only suffered to retain the powers necessary to the administration of their State

systems. The idea which has been so long and falsely entertained of each being a sovereign State, must be given up; for it is absurd to suppose there can be more than one sovereignty within a government. The States should retain nothing more than that mere local legislation, which, as *districts* of a general government, they can exercise more to the benefit of their particular inhabitants, than if it was vested in a Supreme Council; but in every foreign concern as well as in those internal regulations, which respecting the whole ought to be uniform and national, the States must not be suffered to interfere. No act of the Federal Government in pursuance of its constitutional powers ought by any means to be within the control of the State Legislatures; if it is, experience warrants me in asserting they will assuredly interfere and defeat its operation.

"The next article proposes to invest a number of exclusive rights, delegated by the present confederation, with this alteration: that it is intended to give the unqualified power of raising troops, either in time of

peace or war, in any manner the Union may direct. It does not confine them to raise troops by quotas on particular States, or to give them the right of appointing regimental officers, but enables Congress to raise troops as they shall think proper, and to appoint all the officers. It also contains a provision for empowering Congress to levy taxes upon the States, agreeable to the rule now in use, an enumeration of the white inhabitants, and three-fifths of other descriptions.

"The 7th article invests the United States with the complete power of regulating the trade of the Union, and levying such imposts and duties upon the same, for the use of the United States, as shall in the opinion of Congress, be necessary and expedient.

"The 8th article only varies so far from the present, as in the article of the Post Office, to give the Federal Government a power not only to exact as much postage as will bear the expense of the office, but also for the purpose of raising a revenue. Congress had this in contemplation some time since, and there can be no objection, as it is presumed, in the

course of a few years the Post Office will be capable of yielding a considerable sum to the public treasury.

"The 9th article, respecting the appointment of Federal courts for deciding territorial controversies between different States, is the same with that in the confederation; but this may with propriety be left to the supreme judiciary.

"The 10th article gives Congress a right to institute all such offices as are necessary for managing the concerns of the Union; of erecting a federal judicial court for the purposes therein specified; and of appointing courts of Admiralty for the trial of maritime causes in the States respectively.

"The exclusive right of coining money—regulating its alloy, and determining in what species of money the common treasury shall be supplied—is essential to assuring the federal funds.

"In all those important questions, where the present confederation has made the assent of nine States necessary, I have made the assent of two-thirds of both Houses, when assembled in Congress, and added to the number

the regulation of trade, and acts for levying an impost and raising a revenue.

"The exclusive right of establishing regulations for the government of the milita of the United States, ought certainly to be vested in the federal council.

"The article empowering the United States to admit new States into the confederacy is become indispensable, from the separation of certain districts from the original States—and the increasing population and consequence of the western territory. I have also *added an article* authorizing the United States, upon the petition from the majority of the citizens of any State or convention authorized for that purpose, and of the legislature of the State to which they wish to be annexed, or of the States among which they are willing to be divided, to consent to such junction or division, on the term mentioned in the article.

"The Federal Government should also possess the exclusive right of declaring on what terms the privileges of citizenship and naturalization should be extended to foreigners.

"The 16th article proposes to declare that if it should hereafter appear necessary to the

United States to recommend the grant of any additional powers, that the assent of a given number of the States shall be sufficient to invest them and bind the Union as fully as if they had been confirmed by the legislatures of all the States. The principles of this, and the article which provides for the future alteration of the Constitution by its being first agreed to in Congress, and ratified by a certain proportion of the legislatures, are precisely the same.

"There is also in the articles a provision respecting the attendance of the members of both Houses; it is proposed that they shall be the judges of their own rules and proceedings, *nominate their own officers,* and be obliged, after accepting their appointments, to attend the stated meetings of the legislature; the penalties under which their attendance is required, are such as to insure it, as we are to suppose no man would willingly expose himself to the ignominy of a disqualification.

"The next article provides for the privilege of the writ of habeas corpus—the trial by jury in all cases, criminal as well as civil—the freedom of the press and the prevention of reli-

gious tests as qualifications to offices of trust or emolument.

"There is also an authority to the national legislature, permanently to fix the seat of the general government, to secure to authors the exclusive right to their performances and discoveries, and to establish a Federal University.

"There are other articles, but of subordinate consideration. In opening the subject, the limits of my present observations would only permit me to touch the outlines; in these I have endeavored to unite and apply, as far as the nature of our Union would permit, the excellencies of such of the States' Constitutions as have been most approved.

"I ought again to apologize for presuming to intrude my sentiments upon a subject of such difficulty and importance. It is one that I have for a considerable time attended to. I am doubtful whether the convention will, at first be inclined to proceed as far as I have intended; but this I think may be safely asserted, that upon a clear and comprehensive view of the relative situation of the Union, and its members, we shall be convinced of the

policy of concentring in the federal head, a complete supremacy in the affairs of government; leaving only to the States such powers as may be necessary for the management of their internal concerns."

The first comment to be made on this speech of Pinckney's is *that it was never made, and that no speech whatever was made by him when he presented his draught to the Convention.*

Upon this question of fact there are two witnesses, Madison and Yates. The evidence which they have left to us is negative and positive, the one showing inferentially, what could not have occurred in the Convention on the 29th of May 1787 and the other stating positively what did occur; the one absolutely silent as to any speech by Pinckney; the other telling us that *"Mr. Pinckney a member from South Carolina then added that he had reduced his ideas of a new government to a system which he then read."*

Madison has written for us an account of the manner in which he took his notes and wrote out his Journal—a most interesting account, showing us the method he pursued, the

efforts which he made, and reminding us how much we owe him for his fidelity to his self-imposed task.

"The curiosity I had felt during my researches into the history of the most distinguished confederacies, particularly those of antiquity, and the deficiency I found in the means of satisfying it, more especially in what related to the process, the principles, the reasons, and the anticipations, which prevailed in the formation of them, determined me to preserve, as far as I could, an exact account of what might pass in the Convention whilst executing its trust; with the magnitude of which I was duly impressed, as I was by the gratification promised to future curiosity by an authentic exhibition of the objects, the opinions, and the reasonings from which the new system of government was to receive its peculiar structure and organization. Nor was I unaware of the value of such a contribution to the fund of materials to the history of a Constitution on which would be staked the happiness of a people great even in its infancy, and possibly the cause of liberty throughout the world.

"In pursuance of the task I had assumed, I chose a seat in front of the presiding member, with the other members on my right and left hands. In this favorable position, for hearing all that passed, I noted in terms legible, and in abbreviations and marks intelligible to myself, what was read from the chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the Convention, I was enabled to write out my daily notes during the session, or within a few finishing days after its close, in the extent and form preserved, in my own hand, on my files.

"In the labor and correctness of this, I was not a little aided by practice, and by a familiarity with the style and the train of observation and reasoning which characterized the principal speakers. It happened, also, that I was not absent a single day, nor more than a casual fraction of an hour in any day, so that *I could not have lost a single speech, unless a very short one.*"

Yates was at the time of writing his Minutes 49 years of age. During the Revolution

he had written political essays highly esteemed over the signature of the Rough Hewer. He had been for eleven years a judge of the Supreme Court of New York—a judge of the old school before the days of stenographers and printed arguments and was well trained in taking notes of what counsel said.

The Minutes of Yates are manifestly the work of a man accustomed to take down the ideas rather than the words of public speakers. His reports of the debates are briefer than Madison's showing much less of the reporter and much more of the lawyer or judge accustomed to analyze and to note the scope and sense of an argument. His report of the chief speech of Pinckney, that of June 25th, when compared with the full speech written out by Pinckney for Madison is a remarkably clear and accurate and full abstract. It is also valuable as giving us an abstract of the conclusion of the speech which Pinckney neglected to furnish. Madison says in his letter to Judge Duer, "Mr. Yates's notes as you observe are very inaccurate; they are also in some respects grossly erroneous." There are indeed mistakes resulting from his non-ac-

quaintance with the delegates; and especially in his confusing the names of the two Pinckneys, the first name of each being the same as the first name of the other and both being delegates from the same State. But be that as it may, Yates correctly characterized the speech of Randolph as "long and elaborate," and Pinckney's draught as a "system" of a "new government"; and he certainly knew enough to distinguish between the delivery of a long speech and the reading of a formal document.

The fact therefor must be regarded as established as firmly as any fact recorded in the annals of the Convention that on the day when Pinckney presented his draught to the Convention he did not deliver and could not have delivered a speech making 27 pages of printed matter.

There is another fact to be considered in connection with the foregoing. Between the opening statements of the Observations and the title to the pamphlet there is a flat contradiction. In the speech he says expressly that the "plan will admit of important amendments"; that he does "not mean to offer it for

the consideration of the House"; that he has "taken the liberty of mentioning it because it was his duty to do so." In the title to the pamphlet he says, "Plan of Government submitted to the Federal Convention in Philadelphia on the 28th of May 1787." It is plain that the speech and its title were written at different times and that in this the two are irreconcilable. It is also plain that Pinckney when he wrote a title for the printer in New York had forgotten the detail of the contents of the speech and did not take the trouble to examine it. We may therefore conclude that the two events were far apart, the one having taken place in Charleston before the assembling of the Convention and the other taking place in New York when the publication of the speech required that a title should be given to it.

Furthermore the title to the speech contains a significant error in saying that the plan of government was submitted to the Convention "on the 28th of May"; for the first days of the Convention were not days to be quickly forgotten.

The day fixed for the meeting of the dele-

gates in Convention was Monday, May 14th 1787. Washington, notwithstanding his painful illness during the winter and the expected death of his mother was among the first who arrived in Philadelphia. On the 27th of April he had written to Knox, "Though so much afflicted with a Rheumatick complaint (of which I have not been entirely free for Six months) as to be under the necessity of carrying my arm in a Sling for the last ten days, I had fixed on Monday next for my departure, and had made every necessary arrangement for the purpose when (within this hour) I am called by an express, who assures me not a moment is to be lost, to see a mother and only sister (who are supposed to be in the agonies of Death) expire; and I am hastening to obey this Melancholy call, after having just buried a Brother who was the intimate companion of my youth, and the friend of my ripened age. This journey of mine then, 100 miles, in the disordered frame of my body, will, I am persuaded, unfit me for the intended trip to Philadelphia."

But Washington, though he knew it not, was then approaching the verge of his third cycle

of illustrious service rendered to his country —"the country he assembled out of chaos."

Madison writing to Jefferson, then in Paris, on Tuesday, the 15th of May, happily recorded the fact that Washington, true to his life record, was on the ground when he should have been: "Monday last was the day for the meeting of the Convention. The number as yet assembled is but small. Among the few is General Washington who arrived on Sunday evening, amidst the acclamations of the people, as well as more sober marks of the affection and veneration which continue to be felt for his character."

But a quorum of lesser men did not appear until Friday May 25th. On that day nine States were represented by twenty-nine delegates among whom was Charles Pinckney on whose motion a committee was appointed, of which he was one, to prepare standing rules and orders. The only other business was the election of Washington as President and Major William Jackson as Secretary. On Monday May 28th the Convention next met when "Mr. Wythe, from the committee for preparing rules made a report which employed the de-

liberations of this day." Tuesday May 29th was the great day when Randolph "opened the main business" and presented the Virginia resolutions, and Pinckney "laid before the House the draught of a Federal Government." These were not days to be easily confounded. But between the presentation of the draught to the Convention and the writing of the title for the printer in New York four months had elapsed crowded with labor and excitement, and Pinckney had forgotten the date of the most eventful day of his life. The error of this date means a great deal.

In his letter to the Secretary of State covering the draught in the Department, Pinckney says that he has then four or five draughts of the Constitution in his possession. It is certain that the draught in the Department conforms much more closely to the draught which he presented to the Convention than to the draught which he describes in the Observations. If we consider the facts established (as we must) that the Observations were written before the assembling of the Convention, that they were written many months before their publication, that they were not examined

or revised when they were published, it is easily within the range of possibilities, if not of probabilities, that the draught which formed the "text of the discourse" was one of the four or five which Pinckney had drawn at various times and was not the one which he finally submitted to the Convention.

If the Observations were what they pretend to be the text of a real speech actually spoken at the time when Pinckney was about to present his draught to the Convention they would be very good secondary evidence of the contents of the paper which he held in his hand and which he then and there presented, and thereby parted company with. But a speech which was never spoken to suppositional auditors who never heard it, is not a public declaration of the contents of another paper. The Observations are not a speech because they are cast in the form of a speech. They are simply a paper which may have been written in Charleston before the assembling of the Convention, or (possibly) in New York after the Convention had been dissolved, and whenever written Pinckney may have had before him another of the four or five constitutions

which he had draughted. With the uncovering of the fact that this paper was not contemporaneous, and that it did not necessarily refer to the particular copy of the draught which Pinckney presented to the Convention on the 29th of May, the supposed value of the Observations as evidence to impeach the integrity of the draught in the State Department is blown to pieces.

If this were a suit between Madison and Pinckney it might be held that Pinckney would be estopped from questioning the veracity of the paper which he wrote and made public, or the actuality of the facts which it sets forth. But an estoppel which in the words of Coke, "concludeth a man to alleage the truth" does not extend to the student of Constitutional history. He is not a party to that record and is at liberty to use it for what it may be worth against Pinckney or for Pinckney, to overthrow the draught or to substantiate the draught—to use it in any way which will tend to clear the situation from error, and authenticate the true history of the Constitution.

Madison in his "Note to the Plan" regarded article VIII as "remarkable also for

the circumstance that whilst it specifies the functions of the President, no provision is contained in the paper for the election of such an officer." The plain unquestionable purpose of Madison when so writing was to impress upon the American mind the improbability, the almost impossibility, of Pinckney's having neglected to provide for the election of the President while actually establishing the office and defining the functions of the officer; and hence that the paper which is so remarkable for the omission cannot be a true copy of the one presented to the Convention; and the inevitable inference from this is that the real draught, the one presented to the Convention on the 29th of May contained and must have contained, and could not have overlooked the needed provision declaring how the President should be chosen.

The choosing of the President by means of electoral colleges in which each State should have a proportionate power equal to its total representation in the two houses of Congress was one of the notable compromises between the large and small States; and what Madison says must excite the curiosity of the Constitu-

tional student to know in what manner Pinckney provided in his draught for the choosing of the President and whether he attempted a compromise. The original draught is lost; but here Madison appears with the Observations which he fortunately saw in 1787 and which he fortunately remembered in 1831 and which, remembering, he brought to light and made an authority; and these Observations, according to Madison, presumptively set forth what the original draught contained so fully and accurately that upon the faith of them we can and must reject the copy of the draught which Pinckney produced and placed in the State Department. Therefore we may turn to the Observations with unusual interest to ascertain whether Pinckney provided, and in what manner he provided, for the choosing of the President.

We find that the Observations are as silent as the draught in the State Department. They are not more silent however. If the Observations said nothing and were absolutely silent on the subject of the President, it might be a casual oversight of the writer. But the Observations agree with article VIII;

both recognize the Executive as vested in one person; both limit his term of office, the one to seven, the other to—years; both expressly declare that he shall be re-eligible; both are silent as to the means by which he shall be chosen. The Observations here are little more than a paraphrase of article VIII. Madison regarded the omission to provide for so vitally important a thing as the choosing of the President as "remarkable"; but the more remarkable the omission, the more significant the coincidence.

The explanation of Pinckney's conduct and of the contradictions between his statements in the Observations and the facts appearing on the records of the Convention, including in the term the Madison Journal and the Yates Minutes is, I think, the following:

The first business day of the Convention, probably, was the most impressive day of all its sittings. There were less than forty delegates present but among them were the most distinguished men of the country; Washington, Hamilton, Rufus King, David Brearly, both Robert and Gouverneur Morris, George Read, George Mason, George Wythe, John Rutledge,

John Dickinson and Elbridge Gerry. A painful anxiety existed concerning everything which lay before them—the method of procedure, the specific subjects to be considered, the prejudices of the different States, the views and plans and projects of the different members. Randolph, as heretofore has been said, opened the great business which was to result either in the formation of a National government or in the dissolution of the feeble Confederation which existed, by the presentation of the abstract propositions which the delegates from Virginia had formulated for the consideration of the Convention, and by a masterly address in which he set forth the perils of the hour and the difficulties to be overcome. When he concluded his solemn and philosophical exposition of the impending problems the Convention adjourned as well it might.

Pinckney must have been impressed by this. He had studied the field long and intelligently; but there were now waters before him which were beyond his depth—difficulties which he had not considered; prejudices and jealousies

for which he had formulated no compromise. It was not the time for the man believed to be the youngest member to harangue the Convention on his scheme for a new government.

Pinckney unquestionably had prepared a written speech in his study in Charleston. It was his strategic purpose to deliver the speech at the opening of the Convention and draw forth expressions of opinion concerning his scheme for a National government, after which he would modify his plan and when modified to suit himself or to suit a majority of the members, he would present it. But when the time came to speak he saw that the Convention was in no humor to listen to an oration about his plan, and that the business before them would be the consideration and discussion of abstract propositions one by one as set forth in the Virginia resolutions, and that no plan would be considered until the delegates should learn by intelligent discussion what they wanted to formulate. He therefore wisely reversed his strategy, withholding the speech but presenting the draught,

thereby placing himself on the record and establishing what in patent law would be called priority of invention.

After the great work was done and the Constitution had gone forth to the world Pinckney knew that his draught was buried in the secrecy of the proceedings. He too, like many another effusive young man, may have thought his speech too good to be lost. Certainly he could not resist the temptation of revealing what he had written and of recording the great part he had played among the eminent actors in the Convention. He avoided violating the pledge of secrecy by revealing no act or proceeding of the Convention, not even that his plan had been presented and referred. And it is fair to say that while he acted like a boy, he also gave out the full record in a manly way. The absurdities in his draught, as some of his provisions must have seemed to many intelligent men, were set forth; the provisions which failed were set forth; the propositions which he himself had abandoned and opposed were set forth. There was no tampering with the record. There are passages in some of his imperfectly

reported speeches in the Convention which bear some resemblance to his discursive rhetorical flights in the Observations, and these he may have thought justified the title with which he prefaced the publication. The two lines on the title page, "Delivered at different Times in the course of their Discussions," are in very small type and appear much as if they had been crowded into a printer's proof—as if they had been an afterthought. But however that may be one thing is certain, that the speech setting forth the contents of his plan was never made in the Convention.

The Observations sustain the draught in the State Department in matters of substance, but not in order and arrangement. The Observations also allude to provisions which are not in the draught in the State Department, provisions which may or may not have been in the draught which was presented to the Convention; and these I shall subsequently examine. As to the variance in order and arrangement there are two things which should be considered: First: as a matter of antiquarian research it would be interesting and satisfactory to ascertain that the one draught was a fac-

simile or exact duplicate of the other; but where the purpose of the inquiry (as in this case) is to ascertain what contributions the draught of Pinckney made to the Constitution of the United States, it is wholly immaterial whether one provision followed another or preceded it, or was far removed from it. The second thing to be remembered is that the draught of the Committee of Detail, so far as it agrees in order and arrangement with the draught in the State Department furnishes us with presumptive evidence of the order and arrangement in the draught which was presented to the Convention. A comparison of the two will show that the variances are so trivial that they are not worthy of further consideration.

As we have seen (chapter VI) Madison did not cite the Observations in the "Note of Mr. Madison to the plan of Charles Pinckney," but did prepare a footnote for the Note to be appended to and published with it by his future editor who he then believed would be Mrs. Madison. Why he did not cite or set forth in his own Note the "striking discrepancies" set forth in the footnote, but planned

and arranged that they should be brought before the public by his editor has seemed inexplicable hitherto. The reason is now plain—he did not wish to assume the responsibility of citing the pamphlet of Pinckney because he knew that it consisted of a speech which was never made.

Madison cited the Observations and the eighth article and the fifth article of Pinckney's draught to secure its condemnation; but of each he might say as Balak the son of Zippor said to the prophet of old, "I took thee to curse mine enemies and behold thou hast blessed them!" He hunted for the Observations; he found them; he brought them to the knowledge of men, he appealed to them, he made them an authority by which Pinckney should be judged out of his own mouth; and lo! they furnish the strongest confirmation of the verity of the draught which he attacked.

The Observations seem to have been a fateful thing, fatal to whichever party relied upon them. Madison exhumed them and believed that they would destroy the pretensions of Pinckney and vindicate himself—and they have but demonstrated the superficiality of his

own investigation and the baselessness of his deductions. Pinckney fearing that the part which he had played in the Convention would never be known, that his great contribution to the Constitution might never receive so much as the notice of men, impelled by his boyish egoism and by what Madison called with reference to another contemporaneous publication, "his appetite for expected praise," improperly laid them before the world—and they have done more than any other one thing to smirch his good name and bury in oblivion the great work of his life.

CHAPTER X

THE SILENCE OF MADISON

UP to this point the draught in the State Department has been considered precisely as Madison desired it should be considered; that is to say upon his objections. The inquiry moreover has been confined to the final indictment which he drew up, to-wit, the "Note of Mr. Madison to the Plan of Charles Pinckney," and to the evidence which he adduced to sustain it, to-wit Pinckney's Observations and letter and Madison's Journal of the Convention. But there is another chapter which must be considered, a chapter of facts and circumstances forming an unseen part of the strategy which his cautious policy supplied.

In his letters to Sparks and the others as in the final "Note," there is a studious comparison instituted between the draught in the State Department and the Constitution itself. There is also an argument implied that the

draught in the Department cannot possibly be identical with the draught presented to the Convention because it contains some provisions which Pinckney opposed in the Convention. A student whose inquiries were limited to early editions of Madison's Writings might draw from them two extenuating inferences, the first of which would be that the weakened memory of age and infirmity had failed to bring before Madison the proper instrument for comparison, the draught of the Committee of Detail; the second that he had never heard of Pinckney's letter to the Secretary of State and knew not that Pinckney had notified the Secretary that the copy which he sent was not a literal reproduction of the lost draught and that it, like the original, contained provisions which on further reflection he had opposed in the Convention.

In the spring of 1830 Mr. Jared Sparks passed a week with Madison at Montpelier and on his return to Washington sent to him the following letter:

"WASHINGTON, May 5th, 1830.

"Since my return I have conversed with

Mr. Adams concerning Charles Pinckney's draught of a constitution. He says it was furnished by Mr. Pinckney, and that he has never been able to hear of another copy. It was accompanied by a long letter (written in 1819) now in the Department of State, in which Mr. Pinckney claims to himself great merit for the part he took in framing the constitution. A copy of this letter may doubtless be procured from Mr. Brent, should you desire to see it. Mr. Adams mentioned the draught once to Mr. Rufus King, who said he remembered such a draught, but that it went to a committee with other papers, and was never heard of afterwards. Mr. King's views of the subject, as far as I could collect them from Mr. Adams, were precisely such as you expressed."

Here it may be noted that what Mr. Adams heard from Mr. King is recorded in his Memoirs, May 4, 1830, Vol. VIII, p. 225. It is only what Sparks reported to Madison. Mr. King had not seen the draught, and had not heard any one narrate what its provisions were. Indeed his doubts and suspicions seem

to have been founded on no other fact than that he did not hear it talked about. Like Madison, he was a witness who could testify to nothing, not even to hearsay.

On the 24th of May, 1831, Mr. Sparks, who was then at work on his life of Gouveneur Morris, again wrote to Madison.

"Boston, May 24, 1831.

"In touching on the Convention, I shall state the matter relating to Mr. Pinckney's draught, as I have heard it from you, and from Mr. Adams as reported to him by Mr. King. Justice and truth seem to me to require this exposition. I shall write to Charleston, and endeavor to have the draught inspected, which was left by Mr. Pinckney. Your explanation, that he probably added particulars as they arose in debate, and at last forgot which was original and what superadded, is the only plausible way of accounting for the mystery, and it may pass for what it is worth. Should anything occur to you, which you may think proper to communicate to me on the subject, I shall be well pleased to receive it."

Madison felt so solicitous about the inquiry in Charleston that on the 21st of June he wrote to Sparks, asking to be informed of the result "as soon as it is ascertained."

But on the 16th of June Sparks had written to Madison the following letter which could not have reached him when he wrote on the 21st.

"BOSTON, June 16th, 1831.

"I have procured from the Department of State a copy of the letter from Mr. Charles Pinckney to Mr. Adams, when he sent his draught for publication. This letter is so conclusive on the subject that I do not think it necessary to make any further inquiry. It is evident, that the draught, which he forwarded, was a compilation made at the time from loose sketches and notes. The letter should have been printed in connexion with the draught. I imagine Mr. Pinckney expected it. He does not pretend that this draught was absolutely the one he handed into the Convention. He only 'believes' it was the one, but is not certain.

"Should you have leisure, I beg you will favor me with your views of this letter. It

touches upon several matters respecting the history and progress of the Convention. Do these accord with your recollection? I would not weary or trouble you, but when you recollect that there is no other fountain to which I can go for information, I trust you will pardon my importunity."

When Sparks wrote his hasty letter of June 16th he was evidently writing under two misapprehensions. The first was that he supposed the question involved was whether the draught on file was an exact copy of the lost original; the second was that its verity depended entirely on Pinckney's accompanying letter. To his inquiry what did Madison think of that letter, Madison made no reply.

But in the course of the next five months Sparks cleared his mind of the above misapprehensions and freed himself from the authority of Madison's opinion; and his strong and well trained mind analysed the facts involved and grasped the real problem of the case. This analysis and this problem he set clearly before Madison in the following letter.

"Boston, November 14th, 1831.

"My mind has got into a new perplexity about Pinckney's Draught of a Constitution. By a rigid comparison of that instrument with a Draught of the Committee reported August 6th they are proved to be essentially, and almost identically, the same thing. It is impossible to resist the conviction, that they proceeded from one and the same source.

"This being established, the only question is, whether it originated with the committee, or with Mr. Pinckney, and I confess that judging only from the face of the thing my impressions incline to the latter. Here are my reasons.

"1. All the papers referred to the committee were Randolph's Resolutions as amended, and Patterson's Resolutions and Pinckney's Draught without having been altered or considered. The committee had them in hand nine days. Their Report bears no resemblance in form to either of the sets of resolutions, and contains several important provisions not found in either of them. Is it probable that they would have deserted these, particularly the former, which had been exam-

ined seriatim in the convention, and struck out an entirely new scheme (in its form) of which no hints had been given in the debates?

"2. The language and arrangement of the Report are an improvement upon Pinckney's Draught. Negligent expressions are corrected, words changed and sentences broken for the better. In short, I think any person examining the two for the first time, without a knowledge of circumstances, or of the bearing of the question, would pronounce the Committee's Report to be a copy of the Draught, with amendments in style, and a few unimportant additions.

"3. If this conclusion be not sound, it will follow that Mr. Pinckney sketched his draught from the Committee's Report, and in so artful a manner as to make it seem the original, a suspicion I suppose not to be admitted against a member of the Convention for forming the Constitution of the United States.

"Will you have the goodness to let me know your opinion? If I am running upon a wrong track I should be glad to get out of it, for I like not devious ways, and would fain have light rather than darkness.

"P. S.—You may be assured, Sir, that I have no intention of printing anything on this subject, nor of using your authority in any manner respecting it. I am aware of the delicate situation in which such a step would place you, and you may rely upon my discretion. I am greatly puzzled, however, in respect to the extraordinary coincidence between the two draughts. Notwithstanding my reasons above given, I cannot account for the committee's following any draught so servilely, especially with Randolph's Resolutions before them, and Randolph himself one of their number.—I doubt whether any clear light can be gained, till Pinckney's original draught shall be found, which is probably among the papers of one of the committee. It seems to me that your secretary of the convention was a very stupid secretary, not to take care of these things better, and to make a better Journal than the dry bones that now go by that name."

This letter set forth the real elements of the case, elements incontrovertible and absolutely certain—that Pinckney's draught was re-

ferred to the Committee of Detail; that it was never considered in the Convention; that the period within which the Committee framed their draught was a brief one; that the Committee's draught bears no resemblance in form to the resolutions of the Convention and contains provisions not found in them; that the Committee so departed from the resolutions, though Randolph himself was one of their number, and struck out an entirely new scheme in form of which no hint had been given in the debates and that the Committee's draught in form, language and arrangement appears to be a copy of Pinckney's with amendments and additions.

From these sure premises Sparks deduced two alternative conclusions; "I think any person examining the two [draughts] for the first time without a knowledge of the circumstances or of the bearing of the question would pronounce the Committee's report to be a copy of the draught with amendments in style and a few unimportant additions," "or that *Mr. Pinckney sketched his draught from the Committee's, and in so artful a manner as to make it seem the original, a suspicion I suppose not*

to be admitted against a member of the convention."

In the second clause of the latter alternative Sparks with admirable sagacity applied the most delicate test that could be applied to the matter. He brings the dilemma down to this: The Committee must have used Pinckney's draught or Pinckney must have sketched his draught from the Committee's; and more than that, he must have sketched it "*in so artful a manner as to make it seem the original.*"

When one instrument is fashioned after another the natural and even unconscious action of the mind is to correct and improve. It is a going forward toward a desirable result. To fashion the second instrument after the first but in such a manner that in many details there would be an unfailing inferiority would be a going backward. This inferiority in detail runs through the Pinckney draught as has repeatedly been shown before. When Sparks wrote the word "artful" he used the right word, the word which controlled the situation—"in so artful a manner as to make it seem the original" most accurately defines

what Pinckney did in Charleston in 1818 if he then fabricated a new draught.

Of course such a fabrication was possible but it would have required a literary forger with a genius for literary forgery to have taken the Committee's draught and given these artless imperfections—these delicate touches of inferiority to the copy for the State Department.

To the specific charge that Pinckney must have sketched his draught "in so artful a manner as to make it seem the original" if it was not what he had represented it to be, Madison made no reply. Sparks had narrowed the issue to this, "Did the Committee follow Pinckney's draught or did Pinckney use the Committee's?" But Madison evaded the issue. Sparks had shown that the Committee did not confine themselves to results arrived at after discussion in the Convention; but that they had incorporated in their draught "important provisions not found in either" set of resolutions, and he called Madison's attention "to the extraordinary coincidence between the two draughts;" and he added that he could not "account for the Com-

mittee following any draught so servilely, especially with Randolph's resolutions before them, and Randolph himself one of their number." It was for Madison then to meet this issue and show definitely where the Committee got the many new provisions of their draught, important and unimportant, if they did not get them from the Pinckney draught.

On the 25th of November, 1831, Madison replied at length to Sparks' letter but he said not a word about the draught of the Committee or of Pinckney's letter to the Secretary of State. His answer was in effect, "Impossible!"

Sparks did not acknowledge the receipt of the letter until the 17th of January, 1832, and then the acknowledgment was called out by a letter from Madison of January 7th. He yielded a reluctant assent, manifestly in deference to Madison, that "this letter seems to me conclusive, but" (he immediately adds), "I am still a good deal at a loss about the first draught of the Committee. The history of the composition of the draught would be a curious item in the proceedings of the Conven-

tion." Here Sparks again put his finger on one of the things that needed explanation, "the composition of the draught." His sagacious mind grasped the fact that the structure of the draught of the Constitution—of the Constitution itself, would indeed be a "curious item in the proceedings of the Convention." It was original work in style, order, details and arrangement; "a curious item" indeed! Whose was the hand that sketched it? When Sparks was so near the end of the matter and on the path which led to the end, it seems almost incredible that he did not take one step forward. If he had he would have solved the problem and dispelled the mystery.

Madison's letter of November 25th seems to have been written for posterity as well as for the man to whom it was sent. Its untold object manifestly was to divert attention from the draught of the Committee and to direct comparison to the Constitution itself. Three years later in his letter to Judge Duer he reiterated what he had said to Sparks, and again he said nothing upon the point which Sparks had plainly placed before him. Final-

ly when he prepared his Note to the Plan, he for a third time, was silent on the primary issue in the case, Did the Committee follow Pinckney's draught or did Pinckney surreptitiously use the Committee's?

This silence of Madison's is a most curious instance of his sagacious and adroit management. It was not his business to direct attention to this troublesome final issue and he did not. The "Note of Mr. Madison to the Plan of Charles Pinckney" would be published; the letters of Sparks to himself might never see the light. Indeed I can give this tribute to his adroitness—that this book was written in the belief that Madison never knew of Pinckney's letter to the Secretary of State, and that his weakened mind had overlooked the draught of the Committee of Detail; and it was not till the book was finished that I found the letters of Sparks above quoted and was compelled thereby to supply this chapter, and modify what I had elsewhere written.

CHAPTER XI

THE WILSON AND RANDOLPH DRAUGHTS

SINCE Madison's time there have been uncovered four papers of which he knew nothing, and they bring us into an almost new field of inquiry. These papers are in the handwriting of James Wilson, Edmund Randolph and John Rutledge (all members of the Committee of Detail) and they are draughts (or sketches for draughts) of the Constitution.

The first paper, chronologically, is not a draught. It was discovered by Professor McLaughlin and was published by him in the Nation of April 28, 1904, and is among the Wilson papers in the library of the Historical Society of Pennsylvania. It is in Wilson's hand and was found among his papers; but if it was drawn up by him, of which I do not feel sure, it is questionable whether it was prepared by him for the Convention of 1787; and it is unquestionable that it was prepared

before the adoption of the 23 resolutions. A single article, or item of the paper will demonstrate this and its worthlessness.

"20. Means of enforcing and compelling the Payment of the Quota of each State."

This is all that there is concerning the rock upon which the Confederation was already wrecked—the dependence of the general government upon the voluntary action of the State governments for revenue. Wilson in 1787 was too intelligent a statesman to even think of retaining this condition of national dependency, and he was too wise a man to talk of "enforcing and compelling" the several States to contribute to the national treasury. He may have prepared the paper some time before the Convention was called, when amendments to the Articles of Confederation were all that was anticipated, but he did not draw up this memorandum after he had become a member of the Committee of Detail.

The second paper in Wilson's hand was discovered by Professor Jameson among the Wilson papers, and was published by him in

the Annual Report of the Historical Association, 1902, Vol. I., p. 151. This paper contains the preamble of the Pinckney draught, and, consequently, of the draught of the Committee. Then follow the first three articles of the Committee's draught, with some slight variations of language; and then under the caption of what should be article 4, come 29 paragraphs containing provisions closely agreeing with provisions in the Committee's but unarranged and incoherent in their order. The second sheet of this draught is unfortunately missing; the third sheet contains various provisions, following closely the 17th, 18th, 19th, 20th and 21st resolutions, and, near the end of the paper, the provision relating to the veto power taken from the constitution of Massachusetts with the term "Governour of the United States" twice used.

The third paper of Wilson was likewise discovered by Professor Jameson. Wilson had prepared the second draught for himself, but this third or final draught manifestly was prepared for the consideration of the other members of the Committee. He wrote it on large foolscap in what is called double col-

umns, *i. e.* half of each page was left blank for the comments and suggestions and amendments of the others. The writing is in the clear, neat, legible hand, characteristic of Wilson, and before the work of revision began, there was hardly a clerical error in the paper. A remarkable contrast is stamped upon it consisting of 43 amendments in the scrawly, slovenly, bold, illegible writing of Rutledge, who really seems to have found pleasure in cutting and slashing the careful work, the almost feminine neatness and niceness of Wilson's pages. This draught unlike the second, is divided into articles, but unlike the Committee's, is not subdivided into sections.

The fourth of these recently discovered papers is in the handwriting of Edmund Randolph. Mr. William M. Meigs in his Growth of the Constitution has done an excellent piece of historical work in reproducing the draught of Randolph in facsimile. In its interlineations, erasures, changes, omissions and marginal queries we see Randolph's doubts and perplexities and the incompleteness of his plan and the limitations of his mental view of a draught; and we see this as

distinctly as if we stood beside him while he wrote. A more disheveled paper was never reproduced in facsimile. Upon its margin are annotations and suggestions of omitted provisions which are in the hand of Rutledge. One thing, most meritorious, appears—that Randolph carefully and conscientiously went through the 23 resolutions and neglected no instruction which they gave. But the chief question remains unexplained as Sparks left it, How came the Committee of Detail to wander so far from the resolutions "with the resolutions before them and Randolph himself one of their number"?

The draught of Randolph begins in this way:

"In the draught of a fundamental constitution two things deserve attention:

"1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable which ought to be accommodated to times and events, and

"2. To use simple and precise language and general propositions according to the example

of the constitutions of the several States."

Randolph then considers the subject of a preamble and sets forth a brief disquisition to show that a preamble is proper and what it should contain. "We are not working," he says, "on the natural rights of men not yet gathered into society, but upon the rights modified by society and interwoven with what we call the rights of States." He outlines what the preamble should set forth; his views are sound, but his intended preamble is not the preamble reported by the Committee of Detail.

There is a curious provision in his draught relating to the compensation of Senators: "The wages of Senators shall be paid out of the treasury of the United States; those wages for the first six years shall be —— dollars per diem. At the beginning of every sixth year after the first the supreme judiciary shall cause a special jury of the most respectable merchants and farmers to be summoned to declare what shall have been the averaged value of wheat during the last six years, in the State where the legislature shall be sitting; and for

the six subsequent years, the Senators shall receive per diem the averaged value of —— bushels of wheat."

This extraordinary provision for the benefit of Senators only illustrates the crudity of Randolph's intentions at the time and the incompleteness of his plan.

The annotations of Rutledge are few but they are valuable for they authenticate the paper; they prove it was the very paper upon which Randolph and Rutledge worked; and that it was all which they had then prepared toward a draught of the Constitution.

These draughts of Randolph and Wilson disclose another fact of unusual interest. When the Randolph draught was found bearing the annotations of Rutledge, it suggested the idea that the two Southern members of the Committee of Detail had put their heads together to draught a constitution which would be accepted at the South, and that probably the three Northern members had prepared another which would be accepted at the North. But the final draught of Wilson dispels that illusion. We now know that Rutledge gave quite as much attention to the Wil-

son draught as to the Randolph draught, and that he wrote many more amendments upon its margin. Nothing has been discovered to show that Ellsworth and Gorham even attempted to draught a constitution; and after finding that the other members used and utilized and amended the Pinckney draught we know that there was nothing left for Ellsworth and Gorham to draught. They were not constructive men in the Convention, though being critically minded they may have rendered good service in the way of revision, but they contributed nothing to the draught of the Committee. Every provision in it is traceable to Pinckney, Wilson, Randolph and Rutledge, and they were its authors.

The second and third draughts of Wilson appear in neatness and completeness to be copies. There is nothing indicative in them of an author's perturbations. The writing is small and finished. If it were not known to be Wilson's hand one could easily believe it to be that of a secretary, giving good work for wages, undisturbed by the cross currents of thought and composition. But on the back of a sheet of the second draught is a paragraph

which is unmistakably a rough draught, which is unquestionably author's work, warped and altered in the uncertainties of construction and composition; and this piece of work is a preamble.

As first written, before erasures and interlineations began, it stood as follows:

"We the people of the States of New Hampshire etc. do agree upon ordain and establish the following Frame of Government as the Constitution of the United States of America according to which we and our Posterity shall be governed under the Name and Stile of the United States of America."

Wilson then amplified the first part of this draught, and the amplifications well illustrate the bent of his mind toward details and particulars; and he next reduced it by omitting the clauses which relate to the government of ourselves and our posterity, and to the "Name and Stile" of the future nation so that it reads as follows:

"We the People of the States of New Hampshire etc. already confederated under and

known by the Stile of the United States of America do ordain declare and establish the following Frame of Government as the Constitution of the said United States."

Neither of these versions is the preamble reported by the Committee. Each lacks the bold simplicity and comprehensiveness and directness of Pinckney's: "We the People of New Hampshire" etc. "do ordain declare and establish the following Constitution for the government of ourselves and posterity."

The preamble is in words and structure a small thing. Two persons having the tasks set them of preparing a preamble with that of Massachusetts before them as material out of which each should be made, could hardly avoid, one would think, evolving out of it two sentences which would be in terms almost identical. But even in this small thing the different traits and methods and style of the two men appear. Pinckney takes the Massachusetts preamble and reduces it until he gets what he wants without a superfluous word. Wilson cannot resist amplifying even while he is condensing. When we get through with

what is unquestionably Wilson's work, the preamble for the Committee remained to be written—unless it was already written in the Pinckney draught.

In the investigation of the charges of Madison against Pinckney it was found that whenever the evidence was subjected to a rigorous examination the case broke down. These draughts of Wilson and Randolph though not intended as a charge against Pinckney may be treated as such—the charge of appropriating Wilson's work and representing it to be his own. Accordingly I have in like manner, examined the evidence and have again found that it does not sustain the charge. A few illustrations will make this plain.

The preamble in the Committee's draught is in Wilson's, word for word. When we find that this preamble is in the preliminary draught of Wilson (a member of the committee), and in the finished product (the draught of the committee), we easily infer that Wilson was the author, the originator of the preamble, and when we find that the same preamble is in the draught of Pinckney and know that he possessed a copy of the Committee's draught

we are in danger of taking another step on the pathway of assumption and reaching the conclusion that Pinckney must have taken his preamble from the Committee's draught. This makes a case against Pinckney which is entitled to explanation or examination.

The preamble to the Constitution of the United States was suggested by the Articles of Confederation and the constitutions of eleven of the thirteen States. Its language was taken by Pinckney or by Wilson, or by both, from the Constitution of Massachusetts by much condensing. Wilson's draught is identical in terms with Pinckney's save for the insertion of a single word, "our," in the last line; "for the government of ourselves and our posterity."

This word "our" is here a word of limitation, a word which taken literally would confine the blessings and government of the Constitution to the men who made it and their posterity. But at the time when these early constitutions were framed the growth of the country it was foreseen would depend chiefly on immigration. The Constitution of Massachusetts does not use the word "citizen," and

throws the door of the elective franchise open to "every male person" "resident in any particular town" and to "the inhabitants of each town." "And to remove all doubts concerning the meaning of the word 'inhabitant' in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within the State in that town, district or plantation where he dwelleth or has his home." The draughtsmen of the Massachusetts Constitution therefore with logical exactitude, left the word "posterity" unrestricted, and broad enough to extend to the posterity of all men who thereafter might become inhabitants within the State.

Two things must now be noted. The first is that every word in Pinckney's preamble, save one, was taken from the preamble of the constitution of Massachusetts; the second, that Pinckney's draught adheres to the unrestricted "posterity" of the constitution, and does not follow the restricted "posterity" of the Wilson draught. The charge that Pinckney's preamble was "necessarily" derived from the Committee's draught is therefore

doubly refuted. There was a source to which Pinckney could go for his preamble, the constitution of Massachusetts, and he went there; there was a deviation from the constitution of Massachusetts in the Wilson draught, and Pinckney did not follow it.

Wilson probably inserted the word "our," in his preamble for a rhetorical reason; for he was one of the signers of an instrument which rang with its own concluding words "OUR LIVES, OUR FORTUNES AND OUR SACRED HONOR."

The insertion of one word (our) in one of these preambles is a slender strand of circumstantial evidence. But circumstantial evidence is made up generally of slender strands; and circumstantial evidence is least suspicious when the strands are severally insignificant. With the Declaration of Independence and the Articles of Confederation and eleven of the State constitutions containing preambles, it is inconceivable that Pinckney would have framed his draught without a preamble; and if Pinckney framed the preamble, as he must have done, it is inconceivable that he would have thrown it aside in 1818 and substituted another man's, for he was never ashamed of

his own work. And it must be taken as a fixed fact that Pinckney had a preamble, for the structure of the draught required it; the first article would be meaningless without one, "The stile of *this government*"—the government announced in the preamble. Therefore having the necessity of a preamble, and the production of one in 1818, and the strict adherence in words and intent to the constitution of Massachusetts and Pinckney's familiarity with that constitution, the severally slender strands become a cord of circumstantial evidence which must satisfy an unprejudiced mind that Pinckney was the author of the preamble in his draught. There are too many clews here to be disregarded, and they all lead one way. The unquestionable sketches of a preamble in Wilson's and Randolph's handwriting show only three attempts and three failures.

Let us now consider a second illustrative case:

As we have seen in a previous chapter (Chap. XI) the 3d of the 23 resolutions declared that the members of the House of Representatives "ought" to receive an adequate

compensation for their services; and the 4th resolution, that the members of the Senate "ought" "to receive a compensation for the devotion of their time to the public service." The term "adequate" implied and required the exercise of some discretionary power, which must necessarily be national. For if Senators and Representatives were to be paid by the States which sent them to Congress, the members of Congress could not well turn around and dictate to the States what they should be paid. This was understood at the time. For on the 22d and 26th of June when the Convention refused to retain the words "to be paid out of the National Treasury" in the 3d resolution, "Massachusetts concurred" as Madison says, "not because they thought the State Treasury ought to be substituted; but because they thought nothing should be said on the subject, in which case it wd. silently devolve on the Nat. Treasury to support the National Legislature."

Furthermore this thing was not done in a corner and the consideration of it was not confined to an hour. On the 12th of June the Committee of the Whole had resolved that the

Representatives in Congress "ought to be paid out of the National Treasury," and again on the same day that Senators "ought" "to be paid out of the National Treasury"; and on the 13th of June the committee had voted to report these resolutions to the Convention; and on the 22d of June the Convention had refused to change this to payment by the States. Moreover the proposition that members be paid by the States had been condemned by the strongest men in the Convention. "Those who pay are the masters of those who are paid," Hamilton had said; and Gorham, Randolph, King, Wilson, and Madison had said as much.

Nevertheless the Committee of Detail reported a provision that the members should be paid by the States; and, not only this, but also, that the compensation should be "ascertained" "by the State in which they shall be chosen."

The only reason for or explanation of the Committee's act so far as we know is that working hurriedly, they overlooked one of the details of the 3d and 4th resolution, and, using Pinckney's draught as their copy, inadver-

tently allowed this provision of his to stand unchanged.

In these newly found papers of Wilson this provision making the compensation of the national legislators dependent upon the action of the State legislators appears just as it stands in the draught of the Committee of Detail. Did Wilson originate this or did he get it from the Pinckney draught?

There is good reason for believing that such a provision would be found in Pinckney's draught. On the 22nd of June when the clause of the 3d resolution declaring that members "ought" to be paid out of the public treasury" had been advocated by some of the strongest men in the Convention, and the Convention apparently were about to adopt it, their immediate action was blocked by South Carolina; "The determination of the House on the whole proposition was, on motion of the Deputies of the State of South Carolina, postponed until to-morrow," says the Journal. A State had this right under the Rules of the Convention, and the Deputies of South Carolina exercised it, Pinckney being one of them. On the following day they succeeded in defeat-

ing the adoption of the clause. On the 26th of June General Pinckney "proposed that no salary should be allowed" to Senators. "This branch" he said "was meant to represent wealth; it ought to be composed of persons of wealth." And "on the question for payment of the Senate to be left to the States" South Carolina voted "aye."

But there is no good reason why we might expect to find this provision in Wilson's draught. The resolutions did not so direct; and there had not been a single vote of the Convention which committed this matter of compensation to the States; and Wilson's personal bias could not have misled him for he condemned it. On the 22nd of June he had said in the Convention that "he thought it of great moment that the members of the National Government should be left as independent as possible of the State Governments in all respects," and during the same debate he had moved that the salaries of the 1st branch "be ascertained by the National Legislature." The explanation is that Wilson working with Pinckney's draught before him gave his at-

tention to improving its phraseology; and that the other members of the Committee confiding in Wilson's scrupulous carefulness and particularity overlooked his mistake.

We have before us a third illustration:

The Constitution of New York provided, "The supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the Assembly of the State of New York; the other to be called the Senate of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch of business."

The draught of Pinckney varies slightly; "The legislative power shall be vested in a Congress, to consist of two separate houses; one to be called the house of Delegates; and the other the Senate, who shall meet on the — day of —— in every year."

The draught of Wilson also follows this with little variation:

"The Legislative power of the United States shall be vested in two separate and distinct Bodies of Men, the one to be called the House

of Representatives of the People of the United States, the other the Senate of the United States."

So far we have in these three instruments the same earmark: "the one to be called the Assembly of the State of New York; the other to be called the Senate." "One to be called the House of Delegates and the other the Senate." "The one to be called the House of Representatives, the other the Senate." But the draught of the Committee of Detail departs both in words and structure from this form: "The Legislative Power shall be vested in a Congress to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative upon the other."

Here it was possible that Wilson followed the Pinckney draught, which was in his possession, but it was not possible that Pinckney copied Wilson's draught which was then unpublished and unknown. The words that Pinckney and Wilson both used, "the one to be called the House, the other the Senate" are clews which lead from Pinckney directly to the Constitution of New York. The Com-

mittee changed the words and changed the structure of the sentence and thereby rendered it certain that Pinckney did not derive his provision from their draught.

Let us take another illustrative case:

Luther Martin's resolution of July 17th provided, "The legislative acts of the United States" "and all treaties" "shall be the supreme law of the respective States." (The 7th of the 23 resolutions.) Article VIII. of the draught of the Committee of Detail varied the phraseology in one word "shall be the supreme law of the *several* States." The committee of Style gave us the provision as it stands in the Constitution: (Art. VI.) "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties which shall be made under the Authority of the United States shall be the supreme law of the *land.*"

Turning back from the Constitution to Pinckney's draught, avowedly drawn up before the work of the Convention had even begun, we find in his Artivle VI. "All acts made by the legislature of the United States pursuant to this Constitution, and all treaties

made under the authority of the United States shall be the supreme law of the land."

This assuredly seems to be an instance which confirms Madison; that is to say an instance where as Madison said there are to be found in the draught in the State Department, "the results of critical discussion and modification in the Convention." Must we also add, with Madison "which could not have been anticipated"? Moreover if Pinckney obtained this provision by purloining it, he must have taken it from the Constitution itself. The language in his draught apparently involves and combines three distinct acts of the Convention; the adoption of the resolution of Martin on the 17th of July; the acceptance of the Committee's draught of the 6th of August; the revision by the Committee of Style, just before the dissolution of the Convention. This makes a dark charge against Pinckney—far darker and more specific than any charge that Madison preferred against him. At first sight it seems as if at last Pinckney was taken in the toils of his own weaving, as if there were no escape for him and that he must be convicted. But the simple explanation is that

Pinckney took his provision and its verbiage from the Congress of the Confederated States in the resolution of March 21st 1787. Luther Martin did not adhere to the language of the resolution; and he did not intend to; for his resolution was a compromise, an alternate for a proposed power in Congress to negative the laws of the States, and he intended that his resolution should bear directly and explicitly upon "the respective States." The subject was one of great importance, of surpassing interest and had but recently been disposed of by compromise in the Convention, and the Committee properly adhered to Martin's resolution, correcting only one word by the substitution of another, "several" for "respective," "shall be the supreme law of the several States."

Pinckney had been a member of the Congress when the resolution of March 21st was passed; he may have draughted it himself; and certainly it covered a matter in which he was interested above all other things, the supremacy of the National Government. The Committee of Style may have taken the concluding phrase from the resolution of Con-

gress or they may have placed it in the Constitution on their own motion; for *Trevett* v. *Weeden* had been heard and adjudicated by the Supreme Court of Rhode Island on September 25th, 26th, 1786, and the words "THE LAW OF THE LAND" were in the air; and the term had received a judicial significance which has never been adequately appreciated It meant an authority higher than a statute.

There are three important articles in Wilson's draught which are not Wilson's. These appear on the margin in the handwriting of Rutledge and answer to article XIV, XV and XVI of the Committee's draught. As they are in almost the precise language of Pinckney's articles 12 and 13 the much repeated question again arises, did Rutledge take them from the Pinckney draught; were they then in the Pinckney draught to be taken; or did Pinckney abstract them from the Committee's draught? The question is easily and decisively answered: *these articles are described in the Observations; Pinckney's title to them cannot be questioned; Wilson and Rutledge had his draught before them, and used it, when Rutledge wrote these articles upon the margin.*

The veto power was cast by the Convention in their resolutions with those of the Executive. Pinckney had placed it in his draught among the legislative, though he is careful to say in the Observations that the Executive "is not a branch of the Legislature farther than as a part of the council of revision." Nevertheless he placed the veto at the end of his article 5—an article relating to the choosing of members of the lower house; to the privileges of Representatives and Senators; to the business proceedings of both houses. Wilson more clearly perceived that the American veto would lack the finality of the *Le roy, avisera* of the Crown, and that it would be neither a legislative nor an executive power though having the properties of both; and he properly made of the veto power an entire and independent article, article 7 of his draught. There were members of the Convention who regarded the veto power as a bulwark against the encroachments of the legislative power; and Wilson himself had said that, "the Executive ought to have an absolute negative"; that "without such a self-defence the Legislature can at any moment sink it into non-

existence." Unquestionably the veto provision ought to have been placed in the Committee's draught as Wilson placed it in his own. But it was not. On the contrary it appears there as it appears in Pinckney's, as an incongruous paragraph at the end of an article which deals with the House of Representatives, with the business of both Houses and with the privileges of the members of each. The one thing certain here is absolutely certain—that the Committee in this did not follow Wilson's draught though it was correct and did follow some other draught though it was incorrect.

It is comprehensible that if the provision of the veto power had started wrong as it did in Pinckney's draught, it might have continued wrong, and its misplacement might have remained unnoticed; but it is incomprehensible how the error could have been known to at least the two leading members of the Committee and have been actually and plainly corrected by one of them and the provision then have relapsed into the condition in which Pinckney left it, unless the Committee found about the end say of the seventh day that they must forego either the completion of Wilson's

carefully prepared work or their bringing into the convention printed copies for the use of members, and that they then determined to use Pinckney's draught as copy for the printer, letting Wilson work into it, so far as he could, the corrections that he had embodied in his own and the changes which the Committee had agreed upon. The incompleteness with which this was done shows very plainly that toward the end of the ten days the Committee worked in haste. There are too many errors in the draught which would be both inexcusable and inexplicable if the Committee had had ordinary time to do their extraordinary work.

There is a curious omission in Wilson's draught which indirectly brings to the light the composite authorship of one section of the Constitution.

In 1777 the punishment of treason had been a delicate subject in the United States more likely to be avoided than discussed. In 1787 the members of the Convention had not forgotten that within a dozen years they had had a personal interest in that subject. Pinckney in article 6 had given Congress twenty-two

specific unrestricted powers but when he came to the power to declare the punishment of treason he paused and defined what treason should consist in and provided that no person should be convicted of the restricted crime but by the testimony of two witnesses. He threw all this into a distinct paragraph which ultimately, with additional restrictions, became section 2 of article VII of the Committee's draught. But neither the paragraph of Pinckney nor the section of the Committee is in the draught of Wilson.

Wilson did not overlook the subject, "The Legislature of the United States shall have the power," his draught says, "to declare what shall be treason against the United States," and, having attached no restriction to the power, he properly placed it among the specified powers immediately after the one "To declare the law and punishment of piracies and felonies committed on the high seas and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations."

But Rutledge did not consent to this. He and Pinckney seem to have vaguely feared

that the law of treason might yet be administered in the United States by George III and he scrawled with his ruthless hand on the margin of Wilson's carefully written page, "Not to work corruption of Blood or Forfeit except during the life of the party"; and Wilson thereupon erased his own provision and struck it out from among the specific, unrestricted powers.

Here the significant fact to be noted is that the words written on the margin of Wilson's draught were not taken from Pinckney's. That is to say the restrictions proposed by Rutledge were additional to those set forth by Pinckney. What Pinckney wrote and what Rutledge wrote and nothing more make the second section of the Committee's draught compounded and rearranged. The material was supplied by Pinckney and Rutledge; the reconstruction, judging by the careful and logical way the work was done was by Wilson: 1 the definition of the crime; 2 the power to punish the crime defined; 3 the restriction upon judicial proceedings, on the testimony of two witnesses; 4 the restriction upon the result of conviction, that it should not work cor-

ruption of blood, or forfeiture except during the life of the person attainted. It is also to be noted that no draught of this section 2 has been found. For reasons subsequently to be stated (chap. XII) it must be inferred that it was framed on the margin of the Pinckney draught.

In article 8 of Wilson's draught immediately following his treason clause is this provision:

"To regulate the discipline of the militia of the several States."

In article 6 of Pinckney's draught the same power is given:

"To pass laws for arming organizing and disciplining the militia of the United States."

This grant of power to arm organize and discipline meant that control of State troops should be taken from the States and lodged in the general government. It was a radical departure from what had been; a change not countenanced by the Articles of Confederation and not authorized by the 23 resolutions. During the debates no member of the Convention had so much as suggested it; and on the 26th of July when the Convention adjourned

to enable the Committee of Detail to draught a constitution, Pinckney alone had ventured to formulate a provision which might alarm the States and arouse the anger and opposition of the militia. He had done so; that we know; it is incontrovertible, for it is specifically described in the Observations "the exclusive right of establishing regulations for the government of the militia of the United States ought certainly to be vested in the Federal Government."

Yet the Committee of Detail did not think so and they did not report such a provision. Here again it is possible that Wilson took his provision from Pinckney's draught, but it is not possible that Pinckney took his from Wilson's.

The draught of Randolph discloses three important pieces of information which tend positively to sustain the Pinckney draught. The first is (in the words of Mr. Meigs) "that it was drawn up after the Convention had agreed upon the resolutions that were referred to the Committee of Detail on July 26th; and in numerous instances its language is modeled upon them with even verbal ac-

curacy." (Growth of the Constitution, p. 318.) Manifestly this draught was not written—was not even begun, until after Randolph had become a member of the Committee. The writing of it, the revising of it, its numerous alterations and corrections, the submission of it to Rutledge, his examination of it and his changes and additions must have taken time. Almost every sentence in it is checked as if it had been compared with some other paper. In a word it indicates that some days must have passed after the 26th of July before Randolph and Rutledge could have written it, and revised it, and left it in its present form; and it witnesses the important fact that only five or six days before the finished draught of the Committee of Detail was put in the hands of the printer at least two members of the committee were no nearer completion of the work than this disheveled draught.

The great improbability against the Pinckney draught is that one man alone and unassisted should have prepared so much of the Constitution. But it is a hundred times more improbable that this Committee unassisted by Pinckney's draught should have prepared and

completed their own with all its well selected details, with language carefully taken from many sources, and with provisions far in excess of their instructions, than that Pinckney should have completed his in his own time (making as he did, four or five versions of it), thoroughly versed, as he was, in the needs and weaknesses of the existing general government and the constitutions of the several States, and able to confer, as he did, with the ablest statesmen in the country.

The second thing which the Randolph draught does for us is important and most interesting. It enables us to ascertain the fact that the section of the Committee's draught which declares the jurisdiction of the Supreme Court (Art. XI, sec. 3), was the work of three persons; and the very words which each contributed.

The 16th resolution of the Convention was as follows:

"16. Resolved, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony."

Randolph followed the resolution but enlarged the jurisdiction; and Rutledge added two provisions in marginal notes; and their proposed section was as follows:

"The jurisdiction of the supreme tribunal shall extent, 1, to all cases arising under laws passed by the general Legislature; 2, to impeachments of officers; and 3, to such cases as the national legislature shall assign, as involving the national peace and harmony; in the collection of the revenue; in disputes between citizens of different States (here Rutledge has added on the margin 'in disputes between a State and a citizen or citizens of other States'); in disputes between different States; and disputes in which subjects or citizens of other countries are concerned (here Rutledge has added 'in cases of admiralty jurisdiction'). But this supreme jurisdiction shall be appellate only; except in cases of impeachment and in those instances, in which the Legislature shall make it original; and the Legislature shall organize it. The whole or a part of the jurisdiction aforesaid, according to the discretion of the legislature, may be as-

signed to the inferior tribunals as original tribunals." Meigs, p. 244.

When we pass to the draught of the Committee of Detail we find that the latter part of this section of Randolph's was adopted, but that the first part was rejected. This rejection however was not a curtailment of jurisdiction, but a substitution of other language in the stead of Randolph's. The question therefore which is now presented to us is this, Who contributed the substitute? Who was the author of the first part of the 3d section?

The corresponding declaration of jurisdiction in the Pinckney draught in article 10 contains only four subjects of jurisdiction. Each of these was suggested by other provisions of the draught. Article 8 for instance, provides that the President may be removed "on impeachment by the House of Delegates and conviction in the Supreme Court." Article 10 accordingly provides that the jurisdiction of the Supreme Court shall extend to "the trial of impeachment of officers." The style is characteristic of Pinckney; clear and terse and yet carelessly expressed. "One of these

courts," he says, "shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial and impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction."

If we now turn to the draught of the Committee we shall find that these lines are the first lines of section 3, and that the two draughts are here identical. They contain the same provisions, arranged in the same sequence, expressed in the same terms. These lines therefore form the substitute which appears to have displaced the first part of Randolph's section. The two things fit together with precision.

The significant fact to be noted here is that the Pinckney draught contains the provisions and words which form the apparent substitute in the Committee's draught, but contains nothing more. In a word not one of the provisions which we now know were prepared by Randolph and Rutledge are in the Pinckney draught.

Four then of the grants of jurisdiction in article XI section 3 of the Committee's draught apparently were taken from the Pinckney draught and the remaining four unquestionably were taken from the Randolph draught. The section therefore is composite.

Wilson's draught here comes into the case enabling us to understand how this combination was brought about.

Wilson was in effect rewriting the Pinckney draught. Finding the first four subjects of jurisdiction precisely what he wanted, he retained them as they were without change or amendment. But they were insufficient. Randolph, Wilson and Rutledge were lawyers in practice who could foresee controversies in the future dual system which Pinckney had not foreseen. Accordingly Wilson took four additional subjects of jurisdiction from Randolph's draught having Rutledge's amendments and with some revising thus brought eight subjects of jurisdiction into his draught which subsequently appeared in the Committee's.

To say that Pinckney was fraudulently plagiarising from the Committee's draught 31

years afterward and that while so doing he chanced to take one-half of the Committee's subjects of jurisdiction but not the other half, and that the half which he chanced to take might very well be his own, and that the half which he did not take chanced, as we now know, to be Randolph's is to state an absurdity. There are too many things here to be ascribed to chance; and each and all of them must have chanced to take place to make out a case of plagiarism against Pinckney.

The third piece of information which Randolph's draught gives us is in the nature of positive evidence and establishes directly the fact that the Committee recognized Pinckney's draught and used it.

Under the heading, "*The following are the legislative* [*powers*] *with certain exceptions and under certain restrictions,*" Randolph set forth the powers of Congress, for the most part taken from the Articles of Confederation, "To raise money by taxation"; "To make war," etc., etc. After investing the general government with these powers he turned, not illogically, to restrictions which would prevent the States from usurping or denying the pow-

ers so granted and placed in his draught the following provision:

"All laws of a particular State repugnant hereto shall be void; and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principle cannot be satisfied shall be considered as involved in the general principle."

This section he subsequently cancelled and over it he wrote, *"Insert the 11 article."*

Where then is this article 11 which would restrict the powers of the States and render their laws, if repugnant to the Constitution, void?

It cannot be article XI of the Articles of Confederation; for it provides only for the admission of Canada as one of the States of this Union. It cannot be article XI of the draught of the Committee of Detail for it relates only to "The judicial power of the United States"; to the judges, to jurisdiction; to the trial of criminal offences; and there is not a line which limits the power of a State or declares a statute void. Moreover the restrictions upon the States in the Committee's draught are divided and placed in two

articles which are numbered XII, XIII. It cannot be Article XI of Wilson's draught for it relates to the powers of the Senate, the power to make treaties, to appoint ambassadors and judges, to adjudicate controversies between two or more States, and controversies concerning lands claimed under conflicting grants from different States, it being article IX of the Committee's draught. There is, however, an article 11 which places restrictions upon the States, and meets the requirements of Randolph as exactly as if it had been framed to effect his purpose, and it is article 11 of the Pinckney draught. We know too that it is Pinckney's own, for it is described in the Observations.

With the 11th article in Wilson's draught and the 11th article in the Committee's failing to respond to the requirements of the reference, and with Pinckney's article 11 responding fully and exactly to it, there is but one conclusion left which is that Randolph when he wrote "Insert the 11 article" intended article 11 of the Pinckney draught.

When the fact is established that the Committee of Detail had before them the Pinckney

draught and took from it a single excerpt, though of not more than four lines, the burden cannot rest on Pinckney to account for identities and resemblances. The onus probandi will then be upon the other side; and the issue being whether the Committee used the Pinckney draught or Pinckney copied from the Committee's, the presumption must be, until the contrary be shown, that all identical provisions in the two draughts originated in Pinckney's.

If James Wilson were now living, and asserting that he was the true and unassisted author of the Committee's draught these papers would be strong, though not conclusive, evidence to maintain his claim; and if Pinckney had never prepared a draught of the Constitution and his draught had never been presented to the Convention, and had never been referred to the Committee of Detail for the express purpose of assisting them in drawing up a draught of the Constitution, these papers would justify historical scholars in saying that Wilson should occupy the place which Pinckney occupies, and that the alien member of the Convention was the chief individual contrib-

utor to the Constitution of the United States. But the defect of these papers is that we know nothing about them, save that they are in the handwriting of Wilson and Rutledge. That they are original matter; that they are not made up of excerpts from Pinckney's draught: are propositions which are now sustained only by conjectures.

Against such conjectures, there stand the consistent silences of all the members of the Committee. Gorham lived nine years and said nothing of his colleague's great work. Wilson lived eleven years and saw the government which, conspicuously, he had helped to form firmly established, and became a judge of the Supreme Court, yet while he lived gave no intimation of having drawn up the most important document of the Convention, and when he died left no statement showing the manner in which the work of the Committee of Detail was done. When Wilson passed away it behooved Ellsworth and Rutledge and Randolph to testify to posterity, if not to the men of their own time, of the great part which Wilson had secretly played in the drama of the Constitution, if he was the author of the draught.

But Rutledge lived two years, and Ellsworth nine years, and Randolph fifteen years, and gave no sign.

Against such conjectures too there is the record of the other draught, a series of incontestible facts, each consistent with those that had gone before it and with those which were to come after it. Pinckney prepared a draught; it was presented to the Convention; it was referred to the Committee of the Whole, and thereby made accessible to every member of the Convention; it was referred to the Committee of Detail and thereby placed at the disposal of the committee and brought directly to the notice and knowledge of every member; the Committee never returned it to the Convention and it has not been found among the papers of any one of them; Pinckney published a description of it within a month after the adjournment of the Convention; and a month later republished the description in a newspaper. In 1818 he authorized the publication of a paper which he certified to be a substantial copy of the draught; it was immediately published with the first publication of the secret journal of the Convention and

widely disseminated as a public document; at the time of publication 16 members of the Convention were living who must have desired, we must assume, to see the journal of the proceedings in which they had personally taken part; and when they received the journal received with it a copy of Pinckney's draught; and yet when Pinckney died more than six years afterwards no surviving member of the Convention had denied or questioned the verity of the published draught.

There are very few historical papers in the world which have such a record of publicity behind them as Pinckney's draught; and it is idle to attack such a record with one man's suspicions and another man's inferences, and our own prejudices and conjectures. Two incontrovertible facts are that at the time when these papers were written, Pinckney's draught was in possession of these same men, Wilson, Randolph and Rutledge, and that they never returned it to the Convention. This examination brings us round a circle to the question at which we started, Did the Committee rightly use the draught of Pinckney, or did Pinckney fraudulently copy the Committee's draught?

WILSON AND RANDOLPH DRAUGHTS

The Randolph and Wilson draughts bring the case into this situation:

1. Randolph, Wilson and Rutledge were the working members of the Committee and worked together. All that was done with the pen, so far as we know, was done by them. Wilson was the ready writer of the Committee and had before him, when he wrote his final draught, his own preliminary draught and Randolph's draught and Pinckney's draught.

2. The final draught of Wilson was not begun until after his own preliminary draught was finished. The 43 amendments of Rutledge came later and were all subsequently considered and accepted by the Committee.

3. From an intellectual point of view the final draught of Wilson with the annotations of Rutledge came near to being the draught of the Committee of Detail; but it was not the completed draught of the Committee even from an intellectual point of view; for additional provisions were framed and the arrangement of provisions was changed and the articles were subdivided into sections. From a printer's point of view the material for a written

draught which was to be put into type did not yet exist.

4. If a copy of the draught was prepared for the printer (with Rutledge's 43 amendments and the additional provisions and the rearrangement of articles and the subdivision of articles into sections all engrossed therein), it is plain that Wilson, the hard worker of the Committee, was the man who did it. Wilson saved everything that he wrote and, consequently, saved his best. His best is his third, his final draught, but it is not the draught of the Committee. If he had prepared a copy for the printer, it would have been his best—by far the best thing he did. It would have been returned to him by the printer with the proofs; and Wilson we may confidently conclude (knowing how he saved even scraps of his writing) would have preserved it.

5. The evidence relating to the draughts of Randolph and Wilson therefore closes with the draught of the Committee of Detail still undrawn and with very little time left in which it could be prepared for the printer. When we couple together the two significant facts that the Committee's work (*i. e* their

manual labor) ended before they had prepared a draught for the printer, and that Pinckney's draught which was in their possession and had been used by them, disappeared during the same eventful week, there can be but one inference—that the Committee used it.

CHAPTER XII

THE COMMITTEE'S USE OF THE DRAUGHT

UP to this point the subject of consideration has been the charges preferred by Madison against the copy of the draught in the State Department. I now propose to press the investigation in a more positive way; to-wit, by ascertaining whether the Committee of Detail used a draught of which this is a copy or duplicate, and to what extent and in what manner.

In copyright cases where the issue is of plagiarism, it sometimes happens that traces of the earlier work will be found in the later one, be the language ever so carefully paraphrased and the plagiarism ever so carefully hidden. Misspelled names, erroneous dates, genealogical mistakes which originated in the one and reappear in the other are fateful witnesses. If we find such traces in the work of the Committee of Detail we may follow them as detectives follow clues until they find the

criminal; that is to say until we find to a certainty that the Committee used the draught.

The first of these traces of Pinckney's hand in the Committee's draught is a very curious one inasmuch as it discloses the fact that in one provision the Committee followed Pinckney's leading unconsciously, and that their action was unauthorized by the Convention, if not in violation of their positive instructions twice repeated. The subject, the pay of Senators and Representatives, had been much discussed; but neither in the Committee of the Whole nor in the Convention had it ever been voted that the compensation should be either "determined" or "paid" by the States. The proceedings of the Convention in regard to this have been examined at length in the preceding chapter and the details need not be repeated here. It is enough to recall the fact that the Convention resolved expressly that the pay of Representatives should be "adequate," and by implication that the pay of Senators should likewise be adequate; and that the Committee of the Whole had previously resolved that both should be paid out of "the public treasury." How the Committee of De-

tail could have so reversed the determination of the Convention as to provide that the members of both Houses should receive a compensation not necessarily "adequate" and "to be ascertained" as well as "paid" by the State "in which they shall be chosen" is explicable in only one way; to-wit:

Pinckney's draught likewise declared, also in a single provision (art. 6)that "the members shall be paid for their services by the States which they represent." There is a verbal difference between the Committee's draught and the copy of the Pinckney draught in the State Department, a bettering of the English, which was done by Wilson as we have already seen in his draught and it is certain that the Committee reported to the Convention a provision substantially that of the Pinckney draught, a provision which the Convention had more than once rejected. If the Pinckney draught was used as copy for the printer, it is plain enough that the clause of six words "by the States which they represent" may have misled the Committee. With the many propositions which they had to codify and the brief time within which the work must

be done; and the confused and somewhat contradictory action of the Committee of the Whole and the Convention in June, and the divided responsibility and scrutiny of five men, it is easily possible that the Committee were misled by the provision in the Pinckney draught; but it is not possible that they could have been so misled if there had been no Pinckney draught and they had followed the 3d and 4th resolutions and borne in mind the action of the Convention and the words of its leading members.

A second deviation from the instructions given by the Convention relates to the payment of the Executive. The 12th resolution says that the Executive is "to receive a fixed compensation for the devotion of his time to the public service to be paid out of the public treasury." The Pinckney draught (art. 8) says that the President "shall receive a compensation which shall not be increased or diminished during his continuation in office" and stops there. The draught of the Committee (art. X sec. 2) says "He shall, at stated times receive for his services a compensation, which shall neither be increased nor dimin-

ished during his continuance in office," and stops there. In a word we find here Pinckney's language with a word or two of amplification, and a little correction (the kind of deviation which one may expect to find in the revision of a statute or legal document) and we find (as in Pinckney) the important word "fixed" omitted, and the not "increased or diminished" clause of Pinckney inserted, and the provision stopping as Pinckney stops, without the concluding words of the resolution "to be paid out of the public treasury." There is here too much resemblance to Pinckney and too little adherence to the 12th resolution to leave a doubt as to where the Committee's provision came from.

A more notable instance relates to the appointing and treaty-making power of the Senate. The 14th resolution declares that the judges of the "Supreme tribunal shall be appointed by the second branch" *i.e.* the Senate. But the draught of the Committee says (art. IX), "The Senate of the United States shall have power to make treaties, and appoint Ambassadors and judges of the Supreme Court." How came the Committee to invest the Senate

with power to make treaties and appoint ambassadors when no such authority was conferred by the resolutions and no such determination had been reached in the Convention? Pinckney's draught answers the question, (art. 7) the Senate, it says, shall have the sole and exclusive power "to make treaties; and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court." Here the Committee placed the whole treaty-making power and the diplomatic intercourse with foreign nations entirely in the hands of the Senate and for no other reason than that Pinckney had already done so. Such an extension of their work beyond their authority could not have suggested itself. Evidently when adapting Pinckney's work to their own purposes they neglected to strike out "treaties" and "ambassadors."

In Pinckney's draught is set forth (art. 3) "The House of Delegates shall exclusively possess the power of impeachment, and shall choose its own officers; and vacancies shall be supplied by the executive authority of the State in the representation from which they shall happen." And in the Committee's

draught it is similarly set forth (art. IV, sec. 6, 7) "The House of Representatives shall have the sole power of impeachment. It shall choose its speaker and other officers. Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the State in the representation from which they shall happen" (sec. 7). These incongruous things Pinckney threw together in a single sentence. The Committee placed two of them in one section and the third in another, and amplified and corrected as usual; but not one of these powers is enumerated in the twenty-three resolutions; and let it also be noted that the peculiar and awkward phraseology, "the executive authority of the State in the representation from which they shall happen" is in both.

While the uses and misuses of the Pinckney draught conclusively establish the fact that the Committee of Detail did use it and frequently adhere to its text, a more comprehensive and just idea of the service which Pinckney rendered and the manner in which his draught was used in the formation of the Constitution will be obtained by placing ourselves in the

place of the Committee and using it as they must have used it.

At the convening of the Committee the draught which had been referred by the Convention was before them. It was the only draught of the proposed constitution which had been prepared by anyone—the only instrument or document, so far as our knowledge goes, which could be used by them as a pattern or basis for their work. Unquestionably the Committee sooner or later would take up this one instrument of its kind and ascertain how far it would serve their purpose.

The preamble is the first and chief sentence in the Constitution; for it declares the source and supremacy of its authority. "We the people of the United States" "do ordain, declare and establish this Constitution." The preamble goes behind State governments, asking nothing from them, either of authority or consent, and invokes the power which established them, the people of the United States. This supreme power, if the Constitution should be adopted, would allow States and State governments to continue to exist, but to exist subordinate to a new power, the Constitution of

the United States and as parts and not units. In the first letter which Madison (then in New York) wrote to Jefferson (then in Paris) after the adjournment of the Convention, he said:

"It was generally agreed that the object of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States. A voluntary observance of the federal law by all the members could never be hoped for. A compulsive one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent and the guilty, the necessity of a military force, both obnoxious and dangerous, and, in general, a scene resembling much more a civil war than the administration of a regular government.

"Hence was embraced the alternative of a government which, instead of operating on the States, should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation."

The chief idea of the preamble is not set forth in any resolution or act of the Conven-

tion; and no instruction so to declare the source of authority was given to the Committee of Detail. The preamble belongs exclusively to Pinckney, though its words as we have before seen, were taken from the preamble of the constitution of Massachusetts. Chap. XI.

The only amendment which the Committee of Detail made, was in the last line of Pinckney's, the insertion of a single word "our,"—"for the government of ourselves and our posterity." With the exception of this word the Committee took Pinckney's preamble as they found it, and so reported it to the Convention. During the subsequent sittings of the Convention it remained unamended and unquestioned and undiscussed until at last it received the final touch of the Committee of Style.

In article 1 Pinckney followed in part the Articles of Confederation and in part the Constitution of New York: "The stile of this Government shall be the United States of America, and the Government shall consist of supreme legislative, Executive and judicial powers."

This the Committee broke into two articles

and in the first line changed "this" to "the" but made no other change.

Article 2 relates to the legislative power and was taken by Pinckney almost verbatim from the constitution of New York. The Committee changed "House of Delegates" to "House of Representatives," and filled a blank with "first Monday in December," and in place of two "houses" said two "distinct bodies of men," and introduced a needless provision that each house "shall in all cases have a negative upon the other."

Article 3 relates to members of the "house of delegates"; to the term of office, to the qualifications of the electors, to the qualifications of members, to their apportionment among the States, to their proportion with population, to "money bills," impeachment, the choosing of their own officers, and to vacancies. Here the Committee's method of breaking an article into sections begins. But the seven sections of the Committee's follow in the same order and almost in the same words, the sentences of Pinckney. The article, like Pinckney's, begins with, "The members of the

house"; and ends, like his, "in the representation from which they shall happen."

Article 4 relates to the Senate, and here first appear the individual opinions of Pinckney which were shared by no one. His senators were to be chosen by the House of Delegates. "From among the citizens and residents of New Hampshire"—"from among those from Massachusetts"—etc., etc. That is the representation was neither by States nor by population but by an arbitrary assignment in the Constitution. Pinckney believed that the Senate should represent the wealth of the country, and he probably intended that this arbitrary assignment should be representative of wealth. The senators from New Hampshire, Massachusetts, Rhode Island and Connecticut were to form one class; those from New York, New Jersey, Pennsylvania and Delaware another; and the remaining States a third. It was to be determined by lot which should go out of office first, which second, which third. As their times of service expired the House of Delegates was to fill them for a fixed and uniform term. This plan was suggested to

Pinckney by the constitution of New York. Its only merit was that it would make the Senate a continuing body, as we now have it, one-third of the members going out at one time. Its errors seem incredible. It would have enabled the delegates from, say, the eastern and middle States to choose senators who would grossly misrepresent the southern States; with every change in the political supremacy of the House one-third of the senators would change, and one-third of the country might be represented by new and inexperienced men; with the people of a section of one political faith, their senators, chosen for them by the House of Delegates, might be of the opposite political belief. It is plain that when the Committee came to Pinckney's Article 4 they found something which would be of no use to them. The Convention had already marked out their work—the senatorial system which we still have—each State represented by two senators, each senator having an individual vote, the senators chosen by the legislatures of the several States. Yet even this article relating to Pinckney's senate, the Committee used, and used in a way which indicates that

they took the paper upon which it was written and made it serve their purpose in framing their hurried draught. Art. V.

Pinckney's article begins: "The senate shall be elected and chosen by the;" and the Committee's begins: "The senate of the United States shall be chosen by the." At this point the Committee struck out the equivalent of 222 words from the Pinckney article and interlined about half the number, 120 words. (The large imperial unruled foolscap with lines well apart and the broad margin readily admitted of this being done.) But the instant that the necessarily new matter was interlined, the Committee resumed with Pinckney's words. His "Each senator shall be —— years of age" etc., etc., becomes their "Every member of the senate shall be of the age of thirty years at least" etc., etc. Then follow Pinckney's provisions concerning citizenship, concerning the prior period of a senator's citizenship, concerning residence, the article closing as Pinckney's closes, "The Senate shall choose its own President and other officers." Here we have the two most dissimilar articles in the two draughts beginning with the same

words, ending with the same words, containing the same provisions, following the same order, and differing only where the instructions of the Convention compelled the Committee to strike out a large and important portion of the earlier draught and to insert a new and important substitute. If the Committee were rewriting the article, there would be no reason for this extraordinary closeness of adherence—for this moving pari passu—for this going always as far and never farther over the ground traversed.

Article 5 of the Pinckney draught is notable for containing the veto power. The Convention grouped it in the 23 resolutions with the powers of the Executive; Wilson made of it an entire, independent article, but Pinckney who had taken it, as we have before seen, from the constitution of New York, retained its revisionary character and placed it at the end of an article relating to the legislature and legislative business. The Committee left it where Pinckney placed it (Article VI, sec. 13) as we have seen in the preceding chapter; and in this as we have also seen in the preceding

chapter the Committee followed Pinckney and did not follow Wilson.

The 6th article contains another singular instance of an oversight of Pinckney's which the Committee followed. In it he gathers together with care and patience from the Articles of Confederation and from State Constitutions the incidental powers of Congress. The governing clause is, "The Legislature of the United States shall have the power." Then follow some 22 declarations of power, properly paragraphed: "To lay and collect taxes, duties, imposts and excises." "To regulate commerce" etc., etc., until in a final paragraph he sums up and closes the record of these powers by the paragraph, "And to make all laws for carrying the foregoing powers into execution." The power to punish treason Pinckney placed in a distinct paragraph for reasons stated in chapter XI. But this compelled him to rewrite the governing clause, "The Legislature of the United States shall have the power." In the same sentence he appended the definition of treason, "which shall consist only in levying war against the United States" etc. And he then (following

the Act of Edward III), in a separate sentence imposed this condition upon conviction of treason that it shall be "but by the testimony of two witnesses." What Pinckney should have done was what Wilson did; he should have placed this power with the others under the first governing clause, "The Legislature of the United States shall have the power," and have pushed the limitations upon that power over with those relating to "the subject of religion," "the liberty of the press" and "the writ of habeas corpus," into a bill of rights.

This oversight of Pinckney's, the Committee of Detail attempted to hide but not to rectify. The needless duplication of the words, "The Legislature of the United States shall have the power," they pushed out of sight by inverting the provisions of the sentence and defining treason first; but they retained it; and also in this article, properly relating only to legislative powers, they retained the condition laid upon the judiciary that "no person shall be convicted of treason unless on the testimony of two witnesses" (Article VII, sec. 2), and in doing these things,

the Committee overruled Wilson and followed Pinckney.

It is manifest, therefore, that the two draughts, the draught in the State Department and the draught of the Committee, are built upon the same framework. That is to say in structure, arrangement, form and order the two are identical, the one the basis of the other. In other words, the Committee took the draught which had been referred to them, and worked upon it, beginning with the preamble, and continuing to the last sentence, "The ratification of the conventions of —— States shall be sufficient for organizing this Constitution." They amended, changed, substituted, subdivided (articles into sections), and amplified; but it was always Pinckney's draught which they worked upon. They retained every provision of his which was authorized by the instructions of the Convention, and some which were beyond the scope of the instructions and a few which were contrary to the instructions; and whenever they retained a provision, they retained, substantially, the language in which it had been cast by Pinckney. As in mathematics it is held to

be self-evident that things which are equal to the same thing are equal to each other, so here it may be said that this extraordinary identity of the draught in the State Department and the draught of the Committee of Detail demonstrates that the draught in the State Department is a true and substantially exact duplicate of the lost draught which was referred to the Committee.

CHAPTER XIII

WHAT BECAME OF THE DRAUGHT

A QUESTION of much interest follows the foregoing investigation; to-wit, why was not the Pinckney draught found among the records and papers of the Convention?

It was the only draught of a constitution which had been before the Convention; it had been referred to the Committee of the Whole and referred to the committee charged with the duty of preparing a draught of the Constitution; and that committee had used it for that purpose. It was a paper of unique character and unquestionable importance and one of the records of the Convention. Why was it not found in the sealed package of the Convention's records?

And there was another paper, which should have been found but was not. This was the report of the Committee of Detail, containing, or accompanying, their draught of a Constitution. The absence of any other paper that

should have been placed in the package might be strange, yet not significant. But these two papers, if there were two, related to the same subject, contained more or less the same provisions, had been used for the same most important purpose by the same men, and were on the 6th of August, 1787, if they then existed, in the possession and official custody of the Committee of Detail. When Rutledge on the morning of that day "delivered in" the most important report ever laid before the Convention he should have laid upon the Secretary's desk those two papers, if there were such to lay there. Yet neither Pinckney's draught of the Constitution, nor the Committee's draught of the Constitution, was found in the sealed package; nothing was found but one printed copy of the Committee's draught.

The draught of the Committee of Detail was the most important of all the papers of the Convention, for the reason that it was the embodiment of all that had been done during the first period of the Convention's work, the abstract stage, and was to be the foundation of all that was yet to be done in bringing the Constitution to its concrete and final form.

WHAT BECAME OF THE DRAUGHT

For purposes of construction and interpretation the draught is the most valuable paper that exists or that ever did exist, inasmuch as it sets forth in a tangible, practical, unmistakable form the results so far attained and the views which a majority of the members held, and the conclusions which a majority of the States had reached when the work of abstract consideration ceased, and the work of changing their abstract ideas into the concrete provisions of the Constitution began. There was no other report, draught or document which should have been so watchfully guarded and carefully kept as the report of the Committee of Detail, if there were indeed such a document to preserve.

To comprehend and appreciate the significance of the disappearance of these two papers, it is necessary that we understand the conditions of the case—the circumstances which tended toward their destruction, and those which should have secured their preservation.

The first of these conditions was secrecy. The Convention early determined "That nothing spoken in the House be printed or other-

wise published or communicated without leave." No reporter was present at the sittings of the Convention; no stenographer, typewriter or amanuensis served the members; no clerical force aided the Committee of Detail. The secrets of the Convention were in the custody of the members, and from the 29th of May to the 17th of September not one was revealed to the expectant, inquisitive, anxious American world.

As the work of the Convention drew toward its close, it was determined that the obligation of secrecy should be continued into the indefinite future. The records were to be placed under seal and the custodian was to be Washington himself. Washington asked what should be done with the records; and the Convention answered that "he retain the Journal and other papers subject to the orders of Congress, if ever formed under the Constitution." For thirty years and more the seals remained unbroken; and for thirty years and more no member of the Convention spoke.

Let the reader imagine, if he can, what would be the public feeling now, if a convention should be sitting from the 29th of May to

the 17th of September to frame a new constitution for the United States which should sit with closed doors, and whose members should disclose no act, speak no word, drop no hint from the beginning to the end; and who, when the end was reached, should say absolutely nothing of what had been said and done in the secret proceedings of the Convention. We owe much to the framers of the Constitution; they were not common men.

The first and highest instance of this sense of obligation is where we should expect to find it, in the personal journal of Washington.

"Friday, 1st June.

"Attending in Convention—*and nothing being suffered to transpire no minute of the proceedings has been, or will be inserted in this diary.*"

And for this reason, no member of the Committee wrote. The unfortunate Observations of Pinckney were the only publication that gave a glimmer of what had been done, or might have been done in the Convention—of what had been said or might have been said.

The Journal of Madison was not published until after Congress had released the secrets of the Convention. The members had taken no solemn oath, nor clasped hands nor pledged their honor to each other, but they kept silence.

A single incident fortunately preserved by William Pierce of Georgia will show how the obligation was regarded during the sitting of the Convention. It grandly displays the personal majesty of Washington, and the value which he set upon the secrecy of the Convention's deliberations. To a better appreciation of what took place it must be remembered that the Convention as a mark of respect for their great presiding officer established this rule: *"When the House shall adjourn, every member shall stand in his place until the President pass him."*

Mr. Pierce says:

"When the Convention first opened at Philadelphia, there were a number of propositions brought forward as great leading principles for the new Government to be established for the United States. A copy of these propositions was given to each Member with an in-

junction to keep everything a profound secret. One morning, by accident, one of the Members dropt his copy of the propositions, which being luckily picked up by General Mifflin was presented to General Washington, our President, who put it in his pocket. After the Debates of the Day were over, and the question for adjournment was called for, the General arose from his seat, and previous to his putting the question addressed the Convention in the following manner:—

'*Gentlemen:* I am sorry to find some one Member of this Body, has been so neglectful of the secrets of the Convention as to drop in the State House a copy of their proceedings, which by accident was picked up and delivered to me this Morning. I must entreat, Gentlemen, to be more careful, lest our transactions get into the News Papers, and disturb the public repose by premature speculations. I know not whose paper it is, but there it is (throwing it down on the table), let him who owns it take it.' At the same time he bowed, picked up his Hat, and quitted the room with a dignity so severe that every Person seemed alarmed; for my part I was extremely so, for putting my

hand to my pocket I missed my copy of the same Paper, but advancing up to the Table my fears soon dissipated; I found it to be the handwriting of another person. When I went to my lodgings in the Indian Queen, I found my copy in a coat pocket which I had pulled off that Morning. It is something remarkable that no Person ever owned the Paper." (3 Amer. Hist. Review, 324.)

The obligation of secrecy required that these two papers should not be lost—that they should not be left where they might fall into the hands of someone who would publish them, that they should not remain in the possession of a member; and the final determination of the Convention implied that these two papers should be delivered by the Committee of Detail into the hands of the Secretary of the Convention and be by him placed in the custody of Washington.

The second condition was time—the time within which the Committee's work must be done.

On Thursday, the 24th of July, the Convention appointed the Committee of Detail "for the purpose of reporting a Constitution," and

on the 26th, referred to the Committee certain resolutions and "adjourned until Monday, August 6th, that the Committee of Detail might have time to prepare and report the Constitution." This adjournment gave to the Committee ten full days in which to prepare and complete their draught, two of which were Sundays. The committee moreover determined to furnish to each member of the Convention a printed copy. On Monday, the 6th of August, the Committee appeared in the Convention bringing with them the printed copies of the draught.

The draught contains about 3,600 words. A good printer in the olden days when there was not a typesetting machine in the world would have required (according to the computation of a present day printer) three days for doing the work, allowing therein a reasonable time for changes and corrections made in the proofs. It cannot be supposed that after the admonition of Washington, the Committee could be negligent in their selection of a printer. They would not carry their copy into a large printing office, if any such there was in Philadelphia, but would surely place

it in the hands of some individual printer recommended to them as trustworthy by Wilson or Gouverneur Morris or some other delegate from Philadelphia, perchance by Franklin, the greatest printer in the world. In a word, the printing would not have been confided to a shop full of men but would have been given to one man and marked "confidential"; and it is safe to say that the copy must have been in the printer's hands by the close of the 7th day. Besides the typesetting, the proofs were to be examined, and the work scanned in the clearer light ot printed matter by every member of the committee; and errors were to be corrected, and possibly changes made.

After these ten days of actual and constructive work the Committee appeared in the Convention bringing with them a draught containing fifty-seven articles and sections, and some 200 constitutional provisions. Some of these provisions had been prescribed by the 23 resolutions, and some had been suggested by the Articles of Confederation, but there were others declaratory of the inherent powers of a national sovereignty which had neither been directed by the Convention, nor were

contained in the Articles of Confederation. No reflective person beginning the study of the Constitution can read Madison's Journal attentively through to the 26th of July without being astonished by the greater comprehensiveness and detail and breadth and completeness of the draught which the committee produced in a printed form on the morning of the 6th of August.

Besides the provisions in the draught which have passed into, and in a literal or modified form, have become parts of the Constitution, there was some work of the committee which must have involved consideration, discussion, and a waste of time. These hindrances left a perilously narrowed period within which a committee must draught the Constitution of the United States.

It was therefore no time to stand upon trifles or to pause to adjust formal niceties. Within the closed doors of Independence Hall would be impatient men who had given their time since the 25th of May and who were sitting unceasingly through the heat of the Philadelphia summer, defraying in whole or in part their own expenses, though many of them

were men of narrow means, ill able to give either their time or their money. To their anxious eyes the end seemed far away, and success far from certain, and they would resent unnecessary delay. It would be just to young, ambitious Mr. Pinckney to return his draught, unsullied, to the Secretary that it might tell the story in future years, unquestioned and unquestionable, of his splendid contribution to the Constitution. It would be proper and according to parliamentary usage for the committee to hand in their draught in writing, covered by a report attested by their signatures, both of which would remain in the archives of the Convention and perhaps in the archives of a future government. But the committee could not linger for these desirable things. Pinckney's draught must be sacrificed to hasten the good work along, to save time, if it were but a day; and their own report and draught must be "delivered in" figuratively, that is to say by the mouth of their chairman and by the means of the printed copies, one for each member. The committee, so all the circumstances unite in telling us, took Pinckney's draught and considered it; some

provisions they retained; some they corrected, some they amended, some they changed, some they struck out. The amendments they wrote on the broad margin of the large foolscap sheets or wrote out on separate slips of paper which they wafered to the margin. When they had fininshed this work Pinckney's draught had become "printer's copy." For one brief week it served a great purpose and was the most useful document in the world. Then it was scrupulously destroyed; and concerning it no man of the men who knew its contents is known to have spoken a single word.

Apart from the inferential and conjectural statements of the preceding paragraph, the stricter principles of law lead to or toward the same conclusion. The draught was placed in the committee's hands to be used but not to be destroyed. Nevertheless the right to use, like the right of eminent domain, was commensurate with the necessities of the situation, and the committee might use it by destroying it.

The law allows within certain limitations, the presumption of fact that where an administrative officer had a certain, specific official

duty to perform, he performed it. The Secretary of the Convention and the members of the Committee of Detail were not public officers but were charged with duties which, if not official, were still public, and the obligations and presumptions belonging to administrative officers may properly be applied to them. The Secretary's entry in the Journal of the Convention says, "The report was then delivered in at the Secretary's table, and being read once throughout, and copies thereof given to the members, it was moved and seconded to adjourn." All that there was to be "delivered in," was placed upon the Secretary's table, and it became his duty to preserve whatever the Committee had placed there subject to the future commands of the Convention. The "copies thereof" were the printed copies of the draught; and "the report" which was "then delivered in at the Secretary's table" was one of the printed copies accompanied by the oral explanation of the chairman.

What the Secretary did with the papers in his charge is told in the following note and extract:

"Monday Evening.

"Major Jackson presents his most respectful compliments to General Washington. . . .

"Major Jackson, after burning all the loose scraps of paper which belong to the Convention, will this evening wait upon the General with the Journals and other papers which their vote directs to be delivered to His Excellency."

Indorsed by Washington:

"From Majr Wm. Jackson, 17th Sept., 1787."

"Monday, 17th.

"Met in Convention when the Constitution received the unanimous assent of 11 States and Coln Hamilton's, from New York (the only delegate from thence in Convention) and was subscribed to by every Member present except Govr Randolph and Coln Mason from Virginia—& Mr. Gerry from Massachusetts. The business being thus closed, the Members adjourned to the City Tavern, dined together and took a cordial leave of each other.—after which I returned to my lodgings—did some business with, and received the papers from

the secretary of the Convention, and retired to meditate upon the momentous wk which had been executed, after not less than five, for a large part of the time six, and sometimes 7 hours sitting every day, sundays & the ten days' adjournment to give a Com^ee^ opportunity & time to arrange the business, for more than four months." WASHINGTON'S DIARY.

The Secretary of the Convention has generally been censured as incompetent and negligent. Nevertheless the papers which he transferred to Washington witness for him that he did preserve and keep whatever papers came within his official custody. The Secretary of State certified, March 19th, 1796, that in addition to the Journals then received from Washington "were seven other papers of no consequence in relation to the proceedings of the Convention." One of these is a "draught of the letter from the Convention to Congress to accompany the Constitution"; one is an order from "the directors of the Library company of Philadelphia" to the Librarian directing him to "furnish the gentlemen who compose

the Convention now sitting with such books as they may desire during their continuance at Philadelphia, taking receipts for the same"; one is a letter from "one of the people called Jews" setting forth that by the Constitution of Pennsylvania "a Jew is deprived of holding any publick office or place of Government." The others are even of less consequence. They make plain by their unimportance the important fact that Major Jackson scrupulously kept every paper which Rutledge "delivered in at the Secretary's table" on the 6th of August. That is to say, it is made plain that on the 6th of August, Rutledge did not deliver in at the Secretary's table either a written report of the committee or the Pinckney draught.

Judging in the light of all the facts which the case discloses we must conclude that the only thing which would have justified the Committee of Detail in not returning the Pinckney draught to the Secretary of the Convention was that it had been destroyed; the only thing which would have justified the Committee in destroying it, was that they were compelled to use it as printer's copy.

The Committee did well to use it. And yet if there was one thing in the world which justified Pinckney in publishing the Observations, it was that the Committee of Detail had destroyed his draught.

CHAPTER IV

WHAT PINCKNEY DID FOR THE CONSTITUTION

THE style of the Constitution, we owe to Pinckney. Behind him, perhaps, was Chief Justice Jay, whose hand appears in the first Constitution of New York, but none of the men connected with the Convention, not even Hamilton, had attained what we may term the style of the Constitution—the clear, concise, declarative, imperative style which seems a characteristic part of the great instrument. Pinckney appreciated the difference between a constitution and a statute and in maintaining this difference his hand rarely erred. The Committee of Detail corrected Pinckney's language, occasionally, and sometimes rendered the meaning more certain by amplification but whenever they departed from his draught, there is an immediate falling off in style. A flagrant instance of this is in article IX, sections 2 and 3. In the hands of

the Committee the provision relating to disputes and controversies between States expands into a string of minor provisions containing more than 400 words with all the involved petty particularities of an incoherent statute. *Exempli gratia,* "The Senate shall also assign a day for the appearance of the parties, by their agents before that house. The agents shall be directed to appoint, by joint consent, commissions or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several States; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine, names, as the Senate shall direct, shall in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be," etc., etc. The person who remembers that this and more like it, was actually prepared and printed and reported to the Convention as a proposed part of the Constitution of the

United States, may well wonder what kind of a Constitution the Committee of Detail would have framed, if they had not had Pinckney to block out their work for them.

When dealing with the number of representatives in the first or lower house, Pinckney provided (Art. 3) for a specific number from each State, in the first instance, and then by one of his terse emphatic sentences, "and the legislature shall hereafter regulate the number of delegates by the number of inhabitants, according to the provisions hereinafter made at the rate of one for every —— thousand." The Committee adopted this verbatim but they prefaced it with an extraordinary apology or explanation, bearing some resemblance to the preamble of a statute (Art. 14, sec. 4): "As the proportions of numbers in different States will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States—the legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according

to the provisions hereinafter made, at the rate of one for every forty thousand."

This "as," "as," "as," "as," "as" would be slovenly work even for a statute. It sounds little like a law, not at all like a constitution, much like an extract from a committee's report, justifying their work, explaining why a proposed provision may become at some unforeseen time, necessary or desirable.

It is true that the former of these provisions was taken from the Articles of Confederation; and that the latter is a paraphrase of the 8th resolution, but that only makes the matter worse. Their verbosity and incongruity were thereby placed before the eyes of every member of the Committee; and the fact that such provisions, flagrantly verbose and inexcusably incongruous, went into a draught of the Constitution shows that not one of the five members commanded what may be called the style of the Constitution; while the additional fact that not one instance of such prolixity of detail is to be found in the Pinckney draught shows that he was the master of its style and not the Committee.

There are unquestionably clauses and sen-

tences and provisions in the Committee's draught which show the hand of the thoughtful statesman or of the good lawyer. Thus to Pinckney's provisions relating to the action of Congress on bills returned by the President with his objections, we have, "But, in all cases, the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered on the Journal of each House respectively." And to Pinckney's provisions concerning the conviction of treason, there is added, "No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted." In a word there is manifestly more than one hand in the Committee's work. In Pinckney's draught the warp and woof is of one texture from beginning to end. Even when an article is made up entirely of cullings from State constitutions and from the Articles of Confederation, the finished fabric is unquestionably of Pinckney's weaving.

It is not to be inferred that the members of the Comittee of Detail were mediocre men or that they were negligent of the grave duty as-

signed to them. Yet the work which they actually did only demonstrates that for them to have produced a complete draught of the Constitution—as complete as the one which they reported—entirely the work of their own hands, in the limited time allowed them would have been an impossibility. The reduction of the Constitution to a written form with all its details required research, reflection, patient work and unhurried thought. Through the wide field of State and Federal relations, through State constitutions and the Articles of Confederation the framer needed to search, weighing State prejudices and national necessities, taking what was desirable, but with equal care leavng what was objectionable. There were not five men in the world working in each other's way, discussing each other's work, who, unassisted, could have drawn up a constitution in which so much was embodied and so little overlooked and have brought their patchwork contributions into one harmonious whole within the time prescribed. The country was well filled with men of talents, of ability, of energy, of patriotic fervor, with men who knew the conditions of our national af-

fairs, the difficulties of acting, the perils of inaction, and yet the fact, undeniable, is that only one man foresaw the coming necessity of the situation and had the forethought to prepare a draught of the Constitution for the use of the Convention. The more I have surveyed the situation, the greater has appeared the necessity for some such work at the time; the more I have studied the work of Pinckney, the more perfectly adapted to the necessities of the situation does it appear to have been.

When Pinckney, foreseeing that a national Convention would be held and that if it failed to frame a constitution which would give to the waning Confederation the character and authority of nationality, the nationality of the Confederated States might disappear, he resolutely assigned to himself the task of framing one in which nationality should be secure and a national government above and independent of the States be the result. While yet a member of Congress he saw plainly these things—that the government of the Confederated States was drifting toward insolvency, for New York and Massachusetts alone had paid in full their quota of the Federal expenses;

that it was drifting towards war; for at least one of the States was flagrantly violating the treaty of peace with Great Britain; that the Congress could neither raise money nor maintain a treaty; for the only power which it practically possessed was to beseech the States to pay their respective shares of the Federal expenses, and to pass as recently as March 21, 1787, resolutions urging on the States a repeal of all laws contravening the treaty of peace with Great Britain.

Pinckney was then in the full flush of youthful egoism, but the oldest member of the Convention, even Franklin, could not have chosen his method of construction more wisely. Wherever constitutional material existed, Pinckney found it, and preferred it to his own. A single paragraph will give an effective object lesson of his careful composite work:

"The United States shall not grant any title of nobility" (Art. Confederation VI). "The Legislature of the United States shall pass no law on the subject of religion" (Constitution of New York); "nor touching or abridging the liberty of the press" (Constitution

Massachusetts); "nor shall the privilege of the writ of habeas corpus ever be suspended except in case of rebellion or invasion" (Constitution Mass.).

The resolution of March 21, 1787 is as follows:

"WEDNESDAY, MARCH 21, 1787.

"Resolved, That the legislatures of the several states cannot of right pass any act or acts, for interpreting, explaining, or construing a national treaty or any part or clause of it; nor for restraining, limiting or in any manner impeding, retarding or counteracting the operation and execution of the same, for that on being constitutionally made, ratified and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them."

This becomes in the draught:

"All acts made by the Legislature of the United States, pursuant to this Constitution, and all Treaties made under the authority of the United States, shall be the Supreme Law

of the Land; and all Judges shall be bound to consider them as such in their decisions."

I have spoken of the sentence, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" as the most felicitous sentence in the Constitution, which passed through the Committee of Detail, the Committee of Style, and the Convention without the change of a single word. But in the Articles of Confederation the provision stood in this prolix form:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property

imported into any State, to any other State of which the owner is an inhabitant."

That the work was Pinckney's we know, for the provisions set forth in articles 12 and 13 of his draught are described in the Observations.

But though the work of Pinckney was built of the thoughts, phrases and provisions of other men, the structure was his own; and in its details as in its general design, he never failed in his intent that the new republic which he was trying to found should be a nation, and that its government should have all the powers, duties, responsibilities and authority essential and incidental to nationality. The thought may have been in other minds but another draughtsman by a slight change of expression might have warped the idea and left it of no avail. It is this comprehensive generality of treatment and expression which I am now inclined to hold was Pinckney's greatest contribution to the Constitution. Indeed if Marshall had laid his hand on Pinckney's shoulder and said, "Young man, so frame your constitution that I shall be able to interpret it according to the necessities of

the Republic and in harmony with the general requirements of our nationality," Pinckney would not have needed to change a single line.

For more than 70 years, Pinckney has been a condemned and misrepresented man, and what is strange, though not inexplicable, his disgrace was primarily caused by the indispensable work which he unselfishly performed for his country without honor and without reward. I began the foregoing investigation of the authenticity and verity of the draught in the State Department in consequence of the publication of Pinckney's letter to the Secretary of State in 1818 in which he states frankly that the paper sent is not a literal duplicate of the draught presented to the Convention and that the draught contained provisions which he subsequently condemned and openly opposed during the debates. I knew of the worst side of Pinckney's character—his egoism, his garrulousness, his lack of cautious common sense—and in my early study of the Constitution the Pinckney draught had seemed too much to be the work of one man, and the charges of Madison with the implications of Elliot and the silence of Story and

the censure of Bancroft had confirmed my suspicion and left me with a poor opinion of the draught in the State Department and of the man who placed it there. The most which I expected from this investigation was that I should be able to say with tolerable certainty that a section here or a paragraph there in the Constitution, was the work of Pinckney. But when under the pressure of unquestionable facts, the charges of Madison fell to pieces; and when with the refutation of a charge, just so much of the draught would be positively verified and affirmed; and especially when it plainly appeared, not only that in sections and articles, and provisions and sentences, the one instrument agreed with the other but that in form and style, and phraseology and arrangement from the words of the preamble, "We the people do ordain, declare, and establish the following Constitution for the government of ourselves and posterity" to the words of the last article, "The ratifications of —— States shall be sufficient for organizing this Constitution," the draught of the Committee of Detail follows the draught in the State Department, and the Constitution

follows the draught of the Committee of Detail, I was slowly forced to the conclusion that the young South Carolinian on whom I had placed no high estimate, had rendered a great service at a critical time, and that but for his needed work, the Constitution would be, at least in form, a very different instrument from the one which we revere. My slowly formed conclusion is that if wise and judicious forethought, and much patient work well done, and a breadth of view commensurate with the greatness of the subject, and the production at a critical moment of a paper which all other men in or out of the Convention had neglected to prepare, entitle a man to the lasting recognition of his countrymen, there is no framer of the Constitution more entitled to be commemorated in bronze or marble than Charles Pinckney of South Carolina.

CHAPTER XV

CONCLUSIONS ON THE WHOLE CASE

THERE are three reasons why the Pinckney Draught has been too readily discredited. The first is our respect for Madison, our belief that his knowledge far exceeded our own, and our deference to his repeatedly expressed opinion. The second is that the draught was never before the Convention and consequently never received the recognition of discussion. It was referred at the beginning to the Committee of the Whole; but it was not yet wanted, for the Committee debated only abstract propositions couched in formal resolutions. It was referred to the Committee of Detail; but that Committee reported only their own draught and the Convention had before them only the Committee's. The draught of Pinckney never came to a vote, was never discussed, and never received the slightest consideration in the Convention.

The third reason for discrediting the

draught is to be found in the exaggerated value which has been set upon it. It has seemed to be altogether too great an instrument to have been the work of one man. We have felt in a vague way that to concede that one man could have contributed so much to the great instrument would be to detract from the work and fame of the great men whom we call the framers of the Constitution, and from the Constitution itself.

But the fact is that the draught of Pinckney is not so great as it seems. Coming from a man so well equipped for the work, so experienced in the existing affairs of our mixed governments and with such a clear comprehension of the conditions of the case, and having such a mass of material ready to his hand, the draught is not a marvelous production. That is to say the work considered as the work of so young a man is not so wonderful as at first it appears to be. It may come within the range of the improbable but not of the impossible.

Madison has himself borne witness to the fact that the subject of a substitute for the tottering power of the Confederated States

was in every man's mind; and that every intelligent man of that day was more or less fitted to draught a general outline of a new national government:

"The resolutions of Mr. Randolph, the basis on which the deliberations of the Convention proceeded, were the result of a consultation among the Virginia deputies, who thought it possible that, as Virginia had taken so leading a part in reference to the Federal Convention, some initiative propositions might be expected from them. They were understood not to commit any of the members absolutely or definitively on the tenor of them. The resolutions will be seen to present the characteristics and features of a government as complete (in some respects, perhaps more so) as the plan of Mr. Pinckney, though without being thrown into a formal shape. The moment, indeed, a real constitution was looked for as a substitute for the Confederacy, the distribution of the Government into the usual departments became a matter of course with all who speculated upon the prospective change." Letter to W. A. Duer, June 5th, 1835.

The difficulty of the hour was not in

draughting a constitution, but in draughting one which would not arouse the jealous antagonism of the several States. That difficulty did not trouble Pinckney. His plan contemplated having the people of each State fairly, *i. e.*, proportionately represented in his House of Delegates, and in making the several States as States unequivocally submissive to the new national authority.

Pinckney had been for two years immediately before the sitting of the Convention, a delegate in the Congress of the Confederation. He had been the representative of South Carolina in the "grand committee" appointed to consider the alteration of the Articles of Confederation. He had been chairman of the subcommittee which draughted the committee's report of August, 1786; and (as Professor McLaughlin has pointed out) "the introducing phrases, as appears by reference to the manuscript papers of the old Congress, were written in Pinckney's own hand." In witnessing the inherent weakness and increasing degradation of the Congress, he had learned to appreciate the incapacity of the confederate system, and the necessity of a

National government. No member of the Convention better appreciated those two things, or was better equipped for the task which he undertook; and there was no man in the country, except Madison, who had been through such a preparatory course and had such a combination of resources at his command. He was young, talented, experienced, ambitious, wealthy, unemployed and a ceaseless worker. The index of Madison's Journal witnesses to the immense amount of work which Pinckney did irrespective of the draught. If we discard the draught—the original draught, the disputed draught, and the draught described in the Observations, the fact will remain that Pinckney was an important contributor to the work of framing the Constitution.

Pinckney's plan of government was precisely what we might expect it to be. He was an able but not a sagacious statesman; that is he saw clearly what he wanted, but he did not see what other men wanted. Neither did he anticipate as a sagacious statesman would, the ignorance, the adverse interests and the prejudices of those who ultimately would have the

power to reject or ordain the work of the Convention. Therefore he originated none of the compromises which reconciled antagonistic views and made the Constitution possible. The great and difficult problems which confronted the Convention were not solved by the Draught. Pinckney in it provided for two legislative houses and based representation on population, neglecting to place the small States on an equal footing with the large States in the Senate. He provided for one Executive head as did every government in the world, but he devised no means for uniting harmoniously the large and small States in choosing the Executive. The Draught was an admirable instrument for its purpose—an admirable model for the workmen of the Convention to correct, alter and enlarge. It was crude and unfinished but it was in well chosen words and simple sentences, eschewing particulars and presenting in a masterly way great declaratory principles of government. Pinckney had a few fanciful provisions in his plan and yet he was a practical and not a fanciful constitution-maker, not above taking the best material he could find wherever he could

find it, resorting to himself last; and not above throwing aside his own work and beginning again and again until he had patiently wrought out the best that his ability could do. But when in estimating the Constitutional value of the draught, we have given credit for the admirable construction of the plan of government and for the clear declaratory style of the instrument, and for the preamble, and when we have discarded his original schemes, not adopted by the Convention, such as the plan for the Senate, we find that the remainder of the draught is made up for the most part of details suggested by his experience in the Congress of the Confederated States, details which were culled by him with extraordinary care from the constitutions of New York and Massachusetts and the Articles of Confederation.

In a word, the provisions which were rejected, such as a Senate chosen by the House of Representatives; such as a Senate having "the sole and exclusive power" to declare war, to make treaties, to appoint foreign ministers and judges of the Supreme Court; such as a national legislature having power to "revise

the laws of the several States" and "to negative and annul" those which infringed the powers delegated to Congress—do not cause either wonder or admiration. It is the valuable practical provisions of the draught which provoke doubts. Yet these are for the most part the work of selection by an author thoroughly versed in what may be called the Constitutional literature and studies of the day, and who by experience knew precisely what was needed to transmute the Confederated States into an efficient National government.

In our minds we picture the framers of the Constitution as remarkable men, sage in council, experienced in affairs of state. But there were two young men, the one 36, the other 30, who furnished the constructive minds of the Convention. Madison was foremost in framing the Virginia resolutions, which brought before the Convention questions for abstract discussion and bases on which to rest principles of government. Pinckney formulated a constitution which became a basis for the most of the concrete work. Both had had the severe practical training of members of

the Congress of the Confederated States during the sorest period of its humiliating helplessness, the darkening days which preceded its dissolution. Both understood thoroughly the existing system which made the Federal government dependent upon its States and therefore inferior to them; and they knew by what had been to them bitter experience that the solvency of the Federal government was dependent upon the voluntary contributions of each and all of the States, and that a single one of the great States by refusing to pay its quota could bring the nation to bankruptcy. They knew too that while the general government could make treaties, the States could violate them—that they had violated them, and even then had brought the country to the verge of a foreign war. Their minds recoiled, as the minds of young men naturally would, to the opposite extreme, and each believed in the subversion of the States. How fully they agreed a single illustration will disclose.

On Friday, June 8th,

"Mr. Pinckney moved 'that the National Legislature shd. have authority to negative all laws which they shd. judge to be improper.'

He urged that such a universality of the power was indispensably necessary to render it effectual; that the States must be kept in due subordination to the nation; that if the States were left to act of themselves in any case, it wd. be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the corner stone of an efficient national Govt."

"Mr. Madison seconded the motion. He could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect System. Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights and interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs."

But it was for these same reasons that neither Madison nor Pinckney attempted to

frame a compromise. Each wanted a national government with unequivocal powers. Each ignored the jealousy of the small States, the apprehensions of the slave States, the increasing preponderence of the free States. Both intended that these elements of distrust should be absorbed by the overwhelming power of the new national government. For more than 100 years the American people have kept the cardinal idea of these youthful statesmen buried from sight or contemplation as something impractical or dangerous but they are now beginning to ask themselves whether an overwhelming national government is not the better agency for the control and management of their modern, complex, national life.

Considering that Madison and Pinckney worked in such different fields, the abstract and the concrete, it is remarkable that the work of the one repeatedly and constantly agrees with the work of the other. Considering that they had worked side by side for years conferring daily on the same absorbing subject, encountering the same difficulties, thwarted by the same obstacles, defeated by the same incapacities, their minds intent on

the same ends, it is not remarkable that an identity of purpose was followed, though in different forms, by an identity of results and that the work of Pinckney was little more than an embodiment of the propositions of Madison. Together they furnished just what the necessities of the hour required, ideas of government for consideration and discussion; formulated constitutional provisions for amendment and adoption. Greatly to be regretted it is that the two men who did such valuable interserviceable work for the cause to which their lives were then devoted, and whose names should be most closely associated in the history of the Constitution, now appear so irretrievably antagonistic.

There are some provisions in the draught which are not sustained by the confirmatory fact of being incorporated in the draught of the Committee of Detail, and notably the following:

"The legislature of the United States shall have the power" "to pass laws for arming, organizing and disciplining the militia of the United States," Art. 6. This power to organize and discipline the militia was a radical

transfer of authority from the States to the new national government, a power which the committee were not instructed to transfer and which accordingly they did not incorporate in their draught. But it is specifically set forth in the Observations as one of the provisions of the draught; and on the 18th of August Pinckney advocated in the Convention substantially the same thing.

The draught also provides that the legislature of the United States shall have power, "To provide for the establishment of a seat of government for the United States, not exceeding —— miles square, in which they shall have exclusive jurisdiction." Art. 6. This also was a radical innovation which the Committee could not adopt without authority. But it was also specifically set forth in the Observations; and on the 18th of August Pinckney moved in the Convention;

"To fix and permanently establish the seat of government of the United States in which they shall possess the exclusive right of soil and jurisdiction."

The draught also provides, "nor shall the privilege of the writ of habeas corpus ever be

suspended, except in cases of rebellion or invasion." Art. 6.

The Convention shrank from the insertion of a bill of rights in the Constitution because, as was subsequently explained, it was feared that it might bring up the subject of slavery, one member insisting that it should contain a declaration against slavery, and another that it should specifically declare that it did not extend to slaves. Accordingly the committee did not incorporate this declaration of right in their draught. But it is set forth in the Observations; and on the 20th of August Pinckney proposed in the Convention a stronger and more explicit provision.

These provisions, therefore, are sustained by the public, contemporaneous avowal of Pinckney that they were in the draught which he had prepared for the use of the Convention; and by the recorded facts that when he found that the committee had not considered them as within their jurisdiction and had not incorporated them in their draught he brought them before the Convention and sought to have them inserted in the Constitution. As it is certain that the ideas were his, and that he

formulated them into provisions substantially identical with those in the State Department draught, at the time when the Convention was considering the respective subjects, it requires very little additional assurance to make us accept them as a part of the draught presented to the Convention.

Conversely, there are provisions which may have been in the draught presented to the Convention, but which are not in the draught filed in the State Department. The most notable of these is the one relating to patents and copyright. Pinckney says in the Observations "There is also an authority to the national legislature" "to secure to authors the exclusive right to their performances and discoveries;" and on the 18th of August he moved in the Convention to insert among other powers "To grant patents for useful inventions."

If the provision was in the original draught, the Committee of Detail were not authorized to adopt it and did not; but the Convention did and it became a part of the Constitution. Pinckney was constantly nursing his draught, revising, amending, rearranging, and it is not

improbable that he inserted this provision in one copy and neglected to insert it in the others. But he certainly seems to have been the author of it. From one point of view it may seem a needless Constitutional provision; for a national legislature could so legislate without it. But under the British Constitution monopolies were a prerogative of the Crown, and a patent was deemed a monopoly. Pinckney therefore did wisely in expressly assigning patent-rights and copyrights to the legislative branch of the Government, giving to the mind-work of the inventor or author the character of property and the safeguard of the law.

Another provision is the compromise relating to slave representation. In the State Department draught it is provided that the number of the delegates shall be regulated "by the number of inhabitants" (Art. 3) and that "the proportion of direct taxation shall be regulated by the whole number of inhabitants of every description." In the Observations he says that his plan contains a provision "for empowering Congress to levy taxes upon the States, agreeable to the rule now in use, an enumeration of the white inhabitants, and

three-fifths of other descriptions." In the Convention on the 12th of July, "Mr. Pinckney moved to amend Mr. Randolph's motion so as to make 'blacks equal to the whites in the ratio of representation.' This he urged was nothing more than justice. The blacks are the labourers, the peasants of the Southern States: they are as productive of pecuniary resources as those of the Northern States. They add equally to the wealth, and, considering money as the sinews of war, to the strength of the nation. It will also be politic with regard to the Northern States, as taxation is to keep pace with Representation."

This is conclusive as to Pinckney's views. It confirms the draught in the State Department and shows too that the copy of the draught on which the Observations were founded differed in this detail from the draught presented to the Convention.

On a review of the entire case I have reached the following conclusions:

1. The draught in the State Department agrees so closely with the draught of the Committee of Detail, in form, in phraseology, in structure, in arrangement, in extent, in its be-

ginning and its ending that unquestionably the one draught must have followed the other. There can be no middle ground here.

2. With the uncovering of the Committee's draught and the bringing of the Observations into the case and the confirmatory matter in the Randolph and Wilson draughts, it becomes evident that the suspected fraud was an impossibility. That is to say, when Pinckney described in the Observations the draught which he was subsequently to present to the Convention he thereby described the draught which he was ultimately to place in the Department of State. In a word, if a fraud was perpetrated in 1818, it must have been begun in 1787, before the Convention met, which is a reductio ad absurdum.

3. The Observations were printed and published during the lifetime of every member of the Convention, including the five members of the Committee of Detail, and Pinckney immediately republished them in the South Carolina State Gazette. In 1819 when the copy of the draught was published and circulated as a public document there were 16 members of the Convention still living, among

whom was Madison, the chronicler of the Convention.

It must therefore be held that Pinckney did not conceal anything or shrink from investigation; and that all which he did was done in due time, in the light of day and in the most open manner. Indeed it may be asked whether there ever was an historical document which was so doubly published and declared both prior to and at the time when it was produced as the Pinckney draught; or which could have been so easily refuted, if it was really refutable? A court of justice in such a case would say, "The plea of fraud is sustained by no evidence whatever. To allow a document which was placed in the files of the Government at the instance of a high officer of State to be attacked and discredited because of the doubts and suspicions of individuals, no matter how eminent and intelligent, would be a monstrous abuse of authority which can not be upheld in either law or morals."

4. A question may be raised as to whether the Journal of Madison can properly be admitted as evidence against the claim of Pinckney; and it must be conceded that Madison oc-

cupied the position of a controversialist; that during the whole of the period of controversy his chronicle of the Convention was in his exclusive possession; and that it was within his power at any moment to obliterate parts or passages which, coming to the knowledge of the world, would weaken his own position and vindicate Pinckney and sustain the draught. But such a suggestion against the integrity of such a man is not to be lightly entertained. It is no more to be believed without evidence (and evidence of the most clear and unequivocal character) that Madison, for his own purposes, obliterated historical evidence, than that Pinckney fabricated it. Each was a member of the Congress of the Confederation; each was a delegate to the great Convention; each was eminent for his zeal in the prolonged and often hopeless work of framing the Constitution; each has left behind him a long record of distinguished public life. The one laboriously prepared the only draught of the Constitution that was made for the use of the Convention; and the other laboriously prepared the only chronicle of the framers' work which the world possesses. It is not for the

bitterness of controversy, heedlessly, to assail such men.

5. The Journal of Madison must be received as authentic history. At the same time it must be borne in mind that it was not written with the fulness and precision of the modern stenographer. Madison could not transcribe the words which a speaker uttered and leave us to ascertain the speaker's meaning from his words. All that such a reporter could do was to record what he believed to be the speaker's meaning. It follows that condensed passages, isolated sentences, casual turns of expression cannot be used as admissions against Pinckney, and must be considered with disinterested caution, if they be considered at all.

Time which destroys, also discloses; and time may bring to light some record which will change the conclusions of to-day. But as the case now stands it must be said that the Pinckney Draught in the Department of State is (with the exceptions before noted), all that Pinckney represented it to be.

CHAPTER XVI

OF PINCKNEY PERSONALLY

PINCKNEY was in the fourth generation of a family which had been distinguished for more than one hundred years for its public services. He had been elected to the provincial legislature of South Carolina before he had come of age; and he had made himself before the sitting of the Convention a prominent member of the Congress of the Confederated States. He had a clearer apprehension of the actual needs of American nationality than any other member of the Convention. This may be seen in his Observations and in his speech of the 25th of June. There is a passage in that speech in which anticipating the Farewell Address of Washington and the peace policy of Jefferson he looks forward through the ensuing century of the Constitution and depicts the practical blessings which it was to bring to the American people with a clearness and accuracy that is extraordinary:

"Our true situation appears to me to be this — a new, extensive country, containing within itself the materials for forming a government capable of extendng to its citizens all the blessings of civil and religious liberty—capable of making them happy at home. This is the great end of republican establishments. We mistake the object of our government, if we hope or wish that it is to make us respectable abroad. Conquests or superiority among other powers is not, or ought not ever to be, the object of republican systems. If they are sufficiently active and energetic to rescue us from contempt, and preserve our domestic happiness and security, it is all we can expect from them—it is more than almost any other government insures to its citizens."

Pinckney's experience in the Congress of the Confederation made him despise the existing Federal Government and undervalue the local authority of the States. He came into the Convention its most extreme Federalist—more so even than Hamilton. As he said in the Observations:

"In the federal councils, each State ought to have a weight in proportion to its impor-

tance; and no State is justly entitled to greater."

"The Senatorial districts into which the Union is to be divided [in his plan] will be so apportioned as to give to each its due weight, and the Senate calculated in this as it ought to be in every government, to represent the wealth of the nation."

"The next provision [in his draught] is intended to give the United States in Congress, not only a revision of the legislative acts of each State, but a negative upon all such as shall appear to them improper."

"The idea that has been so long and falsely entertained of each being a sovereign State, must be given up; for it is absurd to suppose there can be more than one sovereignty within a government."

"Upon a clear and comprehensive view of the relative situation of the Union, and its members, we shall be convinced of the policy of concentring in the federal head a complete supremacy in the affairs of government."

In the Convention Pinckney moved that the members of the lower House should be chosen by the legislatures "of the several

States''; but this was the one thing which he conceded to "the several States." The Senate was to be chosen by the House of Delegates; and what is more significant, the Senate was not to represent States, with the saving clause, "Each State shall be entitled to have at least one member in the Senate." Finally he would strike an absolutely fatal blow at State sovereignty by providing, "the Legislature of the United States shall have the power to revise the Laws of the several States that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress, and to negative and annul such as do."

Knowing as we do of Pinckney's youth (he was not yet 30) and of Madison's poor opinion of him, it is desirable that we should know, if possible, what his contemporaries in the Convention thought of him. William Pierce the delegate from Georgia who has left to us the anecdote of Washington before quoted (p. 230) noted at the time his impressions of the leading members of the Convention. From these I select his sketches of four of the young members of the Convention who had even then at-

tained distinction, Edmund Randolph, Rufus King, Alexander Hamilton and Charles Pinckney:

"Mr. Randolph is Governor of Virginia—a young gentleman in whom unite all the accomplishments of the Scholar and the Statesman. He. came forward with the postulata or first principles on which the Convention acted; and he supported them with a force of eloquence and reasoning that did him great honor. He has a most harmonious voice, a fine person and striking manners."

"Mr. King is a Man much distinguished for his eloquence and great parliamentary talents. He was educated in Massachusetts, and is said to have good classical as well as legal knowledge. He has served for three years in the Congress of the United States with great and deserved applause, and is at this time high in the confidence and approbation of his Countrymen. This Gentleman is about thirty-three years of age, about five feet ten Inches high, well formed, an handsome face, with a strong expressive Eye, and a sweet high toned voice. In his public speaking there is something peculiarly strong and rich in his expression,

clear, and convincing in his arguments, rapid and irresistible at times in his eloquence but he is not always equal. His action is natural, swimming, and graceful, but there is a rudeness of manner sometimes accompanying it. But take him *tout en semble,* he may with propriety be ranked among the Luminaries of the present age."

"Col. Hamilton is deservedly celebrated for his talents. He is a practitioner of the Law, and reputed to be a finished Scholar. To a clear and strong judgment he unites the ornaments of fancy, and whilst he is able, convincing, and engaging in his eloquence the Heart and Head sympathize in approving him. Yet there is something too feeble in his voice to be equal to the strains of oratory;—it is my opinion that he is a convincing Speaker, that (than) a blazing Orator. Col. Hamilton requires time to think,—he enquires into every part of his subject with the searchings of phylosophy, and when he comes forward he comes highly charged with interesting matter, there is no skimming over the surface of a subject with him, he must sink to the bottom to see what foundation it rests on.—His lan-

guage is not always equal, sometimes didactic like Bolingbroke's, at others light and tripping like Sterne's. His eloquence is not so defusive as to trifle with the senses, but he rambles just enough to strike and keep up the attention. He is about 33 years old, of small stature, and lean. His manners are tinctured with stiffness, and sometimes with a degree of vanity that is highly disagreeable."

"Mr. Charles Pinckney is a young Gentleman of the most promising talents. He is, altho' only 24 [29] y's of age, in possession of a very great variety of knowledge. Government, Law, History and Phylosophy are his favorite studies, but he is intimately acquainted with every species of polite learning, and has a spirit of application and industry beyond most Men. He speaks with neatness and perspicuity, and treats every subject as fully, without running into prolixity, as it requires. He has been a member of Congress, and served in that Body with ability and eclat." (*William Pierce of Georgia;* 3 Amer. Hist. Review, 313.)

In this materialistic world of cause and effect there sometimes seem to be recurring fa-

talities which attend individuals that needlessness has not caused and that foresight could not have prevented—a fate of fire or flood or shipwreck, of good fortune or of bad fortune of successes or of casualties of escapes or of disasters—a fate that fastens upon an individual and cannot be shaken off. The fate assigned to Pinckney seems to have been oblivion. Substantially everything which he prized is gone. His house was one of the finest in Charleston, if not the finest, and it was destroyed. He believed his library to be the most valuable library in the South and his great gallery to hold the rarest pictures in this country yet but a few volumes remain of the one and but two portraits of the other. His garden was the most beautiful in the State, it was his pride, his delight, and obliteration has indeed been its portion; even the soil which bore him flowers and shrubbery and trees and was laden with all the loveliness of semi-tropical vegetation is gone; for it was carried away during the Civil War to make military defenses. At the beginning of this investigation I began to search for the papers of which Pinckney speaks in his letter to the

Secretary of State—papers which might throw new light on the framing of the Constitution or solve the problem of the contents of the draught. In this search General McCrady, of Charleston kindly and sympathetically co-operated, but I soon received his assurance that the quest was not a new one for him, and that neither in the Historical Society of South Carolina of which he was President nor in the possession of his friends could a document or paper or even a letter be found. At that time I desired to obtain a specimen of Pinckney's early handwriting and accordingly carried my pursuit into the circle of his direct descendants; but the sad reply came from his great-grandson, Mr. Charles Pinckney of Claremont, South Carolina that " all of his papers and private manuscripts were destroyed in the great fire in Charleston in 1861," and that his descendants possess "no remains of his handwriting except the autographs in his books." Letters and papers of eminent men are constantly coming to the light from unexpected hiding places and there is the official correspondence in the State Department and papers may exist in the public offices of South Caro-

lina, but apart from these, my investigation stops at a point where it must be said that not so much as a single line of the writing of Charles Pinckney now exists.

In 1787 while Pinckney was in the full possession of his youthful power and fortune and all those things which give a man a prestige above his fellows, fate seems to have leaned forward and touched the instrument which was the supreme work of his life, the Draught of the Constitution of the United States—and to have set a seal upon the lips of every man who could testify as to its contents. If ever there was a paper of which it might be predicted that it would survive its time and be securely kept, that was the paper. The Convention was composed of the most orderly, caretaking and reputable of men, and the author of the draught was one of them. The command of the Convention was that its papers should be preserved. The papers were placed in the custody of the most scrupulous of men and by him transferred to the official guardianship of a department of the Government, and there we might expect to find the draught of Pinckney; but fate had touched the great

State paper, and we find only that it had vanished mysteriously from the earth.

The following biographical sketch is by Mr. Wm. S. Elliott, of South Carolina, a grand nephew of Pinckney:

"In the diploma, by which the degree of Doctor of Laws was conferred upon him by the University of Princeton, New Jersey, it is expressly declared, that it 'is conferred on account of high acquirements, learning and ability, and particularly for his distinguished services in Congress and the Federal Convention.' From 1787 to 1789, he was traveling on the Continent and on his return, was elected Governor of the State. While Governor, he was a delegate to, and made president of the State Convention for forming the Constitution. In 1791 he was chosen a second time, and in 1796 a third time, Governor of the State; in 1798 a Senator in Congress, where he remained until 1801, when Mr. Jefferson appointed him Minister Plenipotentiary to Spain, with power to treat for the purchase of Louisiana and Florida. On his return in 1806, he was a fourth time honored with the position of

Governor of the State, and he is the only citizen who has been so frequently elevated to the executive chair. From this period he retired from public life, until in 1818, when he was elected under great party excitement to the United States House of Representatives by Charleston District, and he here closed his political life with his speech in opposition to the Missouri Compromise.

"Family tradition and genealogical history are the very reverse of amber, which, itself a valuable substance, usually includes trifles; whereas, these trifles being in themselves very insignificant and trifling do, nevertheless, serve to perpetuate a great deal of what is rare and valuable in ancient manners, and to record many curious and minute facts, which could have been preserved and conveyed through no other medium.

"Charles Pinckney professed an exquisite appreciation of the beautiful in nature and in art. His collection of paintings, statuettes, medals, etc., rendered his house almost a museum. His fine library, occupying an entire suite of three large rooms—the floors and windows of which were kept richly carpeted

and curtained, while the ceilings were decorated with classic representations—is supposed to have contained near twenty thousand of the rarest and choicest books, collected from every part of the Continent, and in every language spoken in the enlightened world."

Thomas Pinckney,
who settled in South Carolina in 1687,
was the father of

(2)	(3)
William,	Thomas.

Master in Chancery.
His Son,
Col. Chas. Pinckney.
His Son,
Governor Charles Pinckney.
His Son,
Hon. Henry L. Pinckney.

"A life of Charles Pinckney was prepared and in the possession of the Hon. Henry L. Pinckney for revision and addition; with it were his valuable papers. The fire of 1861, which desolated the city of Charleston, destroyed almost everything, and this, and the former essay, are compiled from many stray

notes, mutilated manuscripts and a few papers, still in our possession.

"A very strange and melancholy feeling overtakes us as we search the remains of Charles Pinckney. Here is a man upon whom Heaven appears to have showered its gifts. Distinguished in ancestry, possessing fine intellect, vigorous health, and large fortune, with his political ambition fully gratified, of refined tastes and cultivation, linking his name successfully and eminently, with his day and his race, and yet, here are his memorials in a few tattered bits of paper, scarcely decipherable. His ashes are in the family burying ground. The spot is known. No stone, however, marks his final resting-place. His house in Charleston years ago, passed into the hands of the stranger, and has been torn down. The very earth has been removed, and now forms one of the fortifications of White Point Battery, erected during the late war for the defense of the city of Charleston. The library is broken and scattered. The picture of Lady Hamilton, and his own portrait, are the only two that we know of that remain of his once splendid gallery. The beautiful

grounds of "Fee Farm" have disappeared, and the plough runs its furrows through the grove, and the grave-yard." DeBow's Review, April 2, 1866.

APPENDIX

APPENDIX

Mr. Charles Pinckney's Draught of a Federal Government

We the people of the States of New Hampshire Massachusetts Rhode Island & Providence Plantations — Connecticut New York New Jersey Pennsylvania Delaware Maryland Virginia North Caroline South Carolina & Georgia do ordain declare & establish the following Constitution for the Government of Ourselves and Posterity.

Article 1:

The Stile of This Government shall be The United States of America & The Government shall consist of supreme legislative Executive and judicial Powers —

2

The Legislative Power shall be vested in a Congress To consist of Two separate Houses—One to be called The House of Delegates & the other the Senate who shall meet on the day of in every Year

3

The members of the House of Delegates shall be chosen every Year by the people of the several

States & the qualification of the electors shall be the same as those of the Electors in the several States for their legislatures—each member shall have been a citizen of the United States for Years—shall be of Yea of age & a resident of the State he is chosen for—until a census of the people shall be taken in the manner herein after mentioned the House of Delegates shall consist of to be chosen from the different states in the following proportions—for New Hampshire. for Massachusetts for Rhode Island . for Connecticut. for New York for New Jersey. for Pennsylvania. for Delaware for Maryld for Virginie. for North Caroline for South Carolina——. for Georgia ——. & the Legislature shall hereafter regulate the number of delegates by the number of inhabitants according to the Provisions hereinafter made, at the rate of one for every thousand——all money bills of every kind shall originate in the house of Delegates & shall not be altered by the Senate—The House of Delegates shall exclusively possess the power of impeachment & shall choose its own Officers & Vacancies therein shall be supplied by the Executive authority of the State in the representation from which they shall happen—

4

The Senate shall be elected & chosen by the House of Delegates which House immediately after their meeting shall choose by ballot Senators from among the Citizens & residents of New Hampshire.

from among those of Massachusetts. from among those of Rhode Island. from among those of Connecticut. from among those of New York. from among those of New Jersey from among those of Pennsylvanie from among those of Delaware— from among those of Maryland. from among those of Virginia from among those of North Caroline from among those of South Caroline & from among those of Georgia—

The Senators chosen from New Hampshire Massachusetts Rhode Island & Connecticut shall form one class—those from New York. New Jersey Pennsylvanie & Delaware one class—& those from Maryland Virginie North Caroline South Caroline & Georgia one class—

The House of Delegates shall number these Classes one two three & fix the times of their service by Lot—the first Class shall serve for Years —the second for Years & the third for Years—as their Times of service expire the House of Delegates shall fill them up by Elections for Years & they shall fill all Vacancies that arise from death or resignation for the Time of service remaining of the members so dying or resigning—

Each Senator shall be years of age at leest —shall have been a Citizen of the United States at 4 Years before his Election & shall be a resident of the state he is chcsen from—

The Senate shall choose its own Officers

Each State shall prescribe the time & manner of holding Elections by the People for the house of Delegates & the House of Delegates shall be the judges of the Elections returns & Qualifications of their members

In each house a Majority shall constitute a Quorum to do business—Freedom of Speech & Debate in the legislature shall not be impeached or Questioned in any place out of it & the Members of both Houses shall in all cases except for Treason Felony or breach of the Peace be free from arrest during their attendance at Congress & in going to & returning from it—both houses shall keep journals of their Proceedings & publish them except on secret occasions & the yeas and nays may be entered thereon at the desire of one of the members present.

Neither house without the consent of the other shall adjourn for more than days nor to any Place but where they are sitting.

The members of each house shall not be eligible to or capable of holding any office under the Union during the time for which they have been respectively elected nor the members of the Senate for one Year after —

The members of each house shall be paid for their services by the State's which they represent—

Every bill which shall have passed the Legislature shall be presented to the President of the United States for his revision—if he approves it he shall sign it—but if he does not approve it he

shall return it with his objections to the house it originated in, which house if two thirds of the members present, notwithstanding the Presidents objections agree to pass it, shall send it to the other house with the Presidents Objections, where if two thirds of the members present also agree to pass it, the same shall become a law—& all bills sent to the President & not returned by him within days shall be laws unless the Legislature by their adjournment prevent their return in which case they shall not be laws.

6th

The Legislature of the United States shall have the power to lay & collect Taxes, Duties, Imposts & Excises

To regulate Commerce with all nations & among the several states—

To borrow money & emit bills of Credit

To establish Post Offices

To raise armies

To build & equip Fleets

To pass laws for arming organising & disciplining the Militia of the United States—

To subdue a rebellion in any state on application of its legislature

To coin money & regulate the Value of all coins & fix the Standard of weights & measures

To provide such Dock Yards & arsenals & erect such fortifications as may be necessary for the United States, & to exercise exclusive Jurisdiction therein

To appoint a Treasurer by ballott

To constitute Tribunals inferior to the Supreme Court

To establish Post & military roads

To establish and provide for a national University at the Seat of the Government of the United States—

To establish uniform rules of Naturalization

To provide for the establishment of a Seat of Government for the United States not exceeding miles square in which they shall have exclusive jurisdiction

To make rules concerning Captures from an Enemy

To declare the law & Punishment of piracies & felonies at sea & of counterfeiting Coin & of all offences against the Laws of Nations

To call forth the aid of the Militia to execute the laws of the Union enforce treaties suppress insurrections & repel invasions

And to make all laws for carrying the foregoing powers into execution.—

The Legislature of the United States shall have the Power to declare the Punishment of Treason which shall consist only in levying War against the United States or any of them or in adhering to their Enemies.—No person shall be convicted of Treason but by the Testimony of two Witnesses.—

The proportions of direct Taxation shall be regulated by the whole number of inhabitants of every description which number shall within Years after the first meeting of the Legislature & within the term of every Years after be taken in

the manner to be prescribed by the legislature

No tax shall be laid on articles exported from the States—nor capitation tax but in proportion to the Census before directed

All laws regulating Commerce shall require the assent of two thirds of the members present in each house—

The United States shall not grant any title of Nobility—

The Legislature of the United States shall pass no Law on the subject of Religion, nor touching or abridging the Liberty of the Press nor shall the Privilege of the Writ of Habeas Corpus ever be suspended except in case of Rebellion or Invasion

All acts made by the Legislature of the United States pursuant to this Constitution & all Treaties made under the authority of the United States shall be the Supreme Law of the Land & all Judges shall be bound to consider them as such in their decisions

7

The Senate shall have the sole and exclusive power to declare war & to make treaties & to appoint Ambassadors & other Ministers to Foreign nations & Judges of the Supreme Court

They shall have the exclusive power to regulate the manner of deciding all disputes & Controversies now subsisting or which may arise between the States respecting Jurisdiction or Territory

APPENDIX

8

The Executive Power of the United States shall be vested in a President of the United States of America which shall be his stile & his title shall be His Excellency——He shall be elected for
Years & shall be reeligible

He shall from time give information to the Legislature of the state of the Union & recommend to their consideration the measures he may think necessary—he shall take care that the laws of the United States be duly executed: he shall commission all the Officers of the United States & except as to Ambassadors other ministers & Judges of the Supreme Court he shall nominate & with the consent of the Senate appoint all other Officers of the United States—He shall receive public Ministers from foreign nations & may correspond with the Executives of the different states—He shall have power to grant pardons and reprieves except in impeachments—He shall be commander in chief of the army & navy of the United States & of the Militia of the several states, & shall receive a compensation which shall not be increased or diminished during his continuance in office—At Entering on the Duties of his office he shall take an Oath to faithfully execute the duties of a President of the United States—He shall be removed from his office on impeachment by the house of Delegates & Conviction in the supreme Court of Treason bribery or Corruption—In case of his removal death resignation or disability The President of the Senate shall exercise the duties of his office until another Presi-

dent be chosen—& in case of the death of the President of the Senate the Speaker of the House of Delegates shall do so——

9

The Legislature of the United States shall have the Power & it shall be their duty to establish such Courts of Law Equity & Admiralty as shall be necessary—the Judges of these Courts shall hold their Offices during good behavior & recieve a compensation which shall not be increased or diminished during their continuance in office—One of these Courts shall be termed the Supreme Court whose Jurisdiction shall extend to all cases arising under the laws of the United States or affecting ambassadors other public Ministers & Consuls—To the trial of impeachments of Officers of the United States—To all cases of Admiralty & maritime jurisdiction—In cases of impeachment affecting Ambassadors and other public Ministers the Jurisdiction shall be original & in all the other cases appellate—

All Criminal offences (except in cases of impeachment) shall be tried in the state where they shall be committed—the trial shall be open & public & be by Jury—

10

Immediately after the first census of the people of United States the House of Delegates shall apportion the Senate by electing for each State out of the Citizens resident therein one Senator for

every members such state shall have in the house of Delegates—Each State however shall be entitled to have at least one member in the Senate——

11

No State shall grant Letters of marque & reprisal or enter into treaty or alliance or confederation nor grant any title of nobility nor without the Consent of the Legislature of the United States lay any impost on imports—nor keep Troops or Ships of War in Time of peace—nor enter into compacts with other states or foreign powers or emit bills of Credit or make anything but Gold Silver or Copper a Tender in payment of debts nor engage in War except for self defence when actually invaded or the danger of invasion is so great as not to admit of delay until the Government of the United States can be informed thereof—& to render these prohibitions effectual the Legislature of the United States shall have the power to revise the laws of the several states that may be supposed to infringe the Powers exclusively delegated by the Constitution to Congress & to negative & annul such as do

12

The Citizens of each state shall be entitled to all privileges & immunities of Citizens in the several states—

Any person charged with Crimes in any State fleeing from Justice in another shall on demand of the Executive of the State from which

he fled be delivered up & removed to the State having jurisdiction of the Offence—

13

Full faith shall be given in each State to the acts of the Legislature & to the records & judicial Proceedings of the Courts & Magistrates of every State

14

The Legislature shall have power to admit new States into the Union on the same terms with the original States provided two thirds of the members present in both houses agree

15

On the application of the legislature of a State the United States shall protect it against domestic insurrections

16

If Two Thirds of the Legislatures of the States apply for the same The Legislature of the United States shall call a Convention for the purpose of amending the Constitution—Or should Congress with the Consent of Two thirds of each house propose to the States amendments to the same—the agreement of Two Thirds of the Legislatures of the States shall be sufficient to make the said amendments Parts of the Constitution

The Ratifications of the Conventions of States shall be sufficient for organizing this Constitution.—

DRAUGHT OF THE COMMITTEE OF DETAIL.

We the People of the States of New Hampshire, Massachusetts, Rhode-Island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

The stile of this Government shall be, "The United States of America."

II

The Government shall consist of supreme legislative, executive and judicial powers.

III

The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives, and a Senate; each of which shall in all cases, have a negative on the other. The Legislature shall meet on the first Monday in December in every year.

THE COMMITTEE'S DRAUGHT

IV

Sect. 1. The Members of the House of Representatives shall be chosen every second year, by the people of the several States comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures.

Sect. 2. Every Member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.

Sect. 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner herein after described, consist of sixty-five Members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode-Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North-Carolina, five in South-Carolina, and three in Georgia.

Sect. 4. As the proportions of numbers in the different States will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legislature shall, in each of these cases,

regulate the number of representatives by the number of inhabitants, according to the provisions herein after made, at the rate of one for every forty thousand.

Sect. 5. All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives.

Sect. 6. The House of Representatives shall have the sole power of impeachment. It shall choose its Speaker and other officers.

Sect. 7. Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the State, in the representation from which they shall happen.

V

Sect. 1. The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall chuse two members. Vacancies may be supplied by the Executive until the next meeting of the Legislature. Each member shall have one vote.

Sect. 2. The Senators shall be chosen for six years; but immediately after the first election they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two and three. The

seats of the members of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, of the third class at the expiration of the sixth year, so that a third part of the members may be chosen every second year.

Sect. 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the State for which he shall be chosen.

Sect. 4. The Senate shall chuse its own President and other officers.

VI

Sect. 1. The times and places and the manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.

Sect. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.

Sect. 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

Sect. 4. Each House shall be the judge of the

elections, returns and qualifications of its own members.

Sect. 5. Freedom of speech and debate in the Legislature shall not be impeached or questioned in any court or place out of the Legislature; and the members of each House shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.

Sect. 6. Each House may determine the rules of its proceedings; may punish its members for disorderly behaviour; and may expel a member.

Sect. 7. The House of Representatives, and the Senate, when it shall be acting in a legislative capacity, shall keep a journal of their proceedings, and shall, from time to time, publish them: and the yeas and nays of the members of each House, on any question, shall, at the desire of one-fifth part of the members present, be entered on the journal.

Sect. 8. Neither House, without the consent of the other, shall adjourn for more than three days nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate, when it shall exercise the powers mentioned in the article.

Sect. 9. The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards.

Sect. 10. The members of each House shall re-

ceive a compensation for their services, to be ascertained and paid by the State, in which they shall be chosen.

Sect. 11. The enacting stile of the laws of the United States shall be. "Be it enacted, and it is hereby enacted by the House of Representatives, and by the Senate of the United States, in Congress assembled."

Sect. 12. Each House shall possess the right of originating bills, except in the cases beforementioned.

Sect. 13. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States for his revision: if, upon such revision, he approve of it, he shall signify his approbation by signing it: But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But, if after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and, if approved by two thirds of the other House also, it shall become a law. But, in all such cases, the votes of both Houses shall be determined by Yeas and Nays; and the names of the persons voting for or against the bill shall be entered in the Journal of each House respectively. If any bill

shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the Legislature, by their adjournment, prevent its return; in which case it shall not be a law.

VII

Sect. 1. The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

To regulate commerce with foreign nations, and among the several States;

To establish an uniform rule of naturalization throughout the United States;

To coin money;

To regulate the value of foreign coin;

To fix the standard of weights and measures;

To establish post-offices;

To borrow money, and emit bills on the credit of the United States;

To appoint a Treasurer by ballot;

To constitute tribunals inferior to the supreme court;

To make rules concerning captures on land and water;

To declare the law and punishment of piracies and felonies committed on the high seas; and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

To subdue a rebellion in any State, on the application of its Legislature;

To make war;

To raise armies;

To build and equip fleets;

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof,

Sect. 2. Treason against the United States shall consist only in levying war against the United States, or any of them, and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

Sect. 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.

Sect. 4. No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.

Sect. 5. No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

Sect. 6. No navigation act shall be passed without the assent of two thirds of the members present in each House.

Sect. 7. The United States shall not grant any title of nobility.

VIII

The acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding.

VIIII

Sect. 1. The Senate of the United States shall have power to make treaties, and to appoint ambassadors and judges of the supreme court.

Sect. 2. In all disputes and controversies now

subsisting, or that may hereafter subsist between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers. Whenever the Legislature, or the Executive authority, or the lawful agent of any State, in controversy with another, shall, by memorial to the Senate, state the matter in question, and apply for a hearing; notice of such memorial and application shall be given, by order of the Senate, to the Legislature or the Executive Authority of the other State in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several States, and from the list of such persons each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons, whose names shall be so drawn, or any five of them shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges, who shall hear the cause, agree in the determination. If either party shall neglect to attend at the day assigned, without shewing sufficient reasons for not attending, or, being present, shall refuse to strike, the Senate shall proceed to nominate three persons out of each State, and the clerk

of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court; or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection, or hope of reward."

Sect. 3. All controversies concerning lands claimed under different grants of two or more States whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different States.

X

Sect. 1. The Executive Power of the United States shall be vested in a single person. His stile shall be, "The President of the United States of Ameca;" and his title shall be, "His Excellency". He shall be elected by ballot by the Legislature.

He shall hold his office during the term of seven years; but shall not be elected a second time.

Sect. 2. He shall, from time to time, give information to the Legislature, of the State of the Union: he may recommend to their consideration such measures as he shall judge necessary, and expedient: he may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he shall think proper: he shall take care that the laws of the United States be duly and faithfully executed: he shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive Ambassadors, and may correspond with the Supreme Executives of the several States. He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. He shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. He shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following Oath or Affirmation, "I solemnly swear, (or affirm) that I will faithfully execute the Office of President of the United States of America." He shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme

Court, of treason, bribery, or corruption. In case of his removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed.

XI

Sect. 1. The Judicial Power of the United States shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Sect. 2. The Judges of the Supreme Court, and of the Inferior courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect. 3. The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and Maritime Jurisdiction; to Contriversies between two or more States (except such as shall regard Territory or Jurisdiction) between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. In

cases of Impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a party, this Jurisdiction shall be original. In all the other cases before mentioned it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such Inferior Courts as it shall constitute from time to time.

Sect. 4. The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by jury.

Sect. 5. Judgment, in cases of Impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust or profit under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

XII

No State shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.

XIII

No State, without the consent of the Legislature

of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another State, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent, as not to admit of a delay, until the Legislature of the United States can be consulted.

XIIII

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

XV

Any person charged with treason, felony, or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive Power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.

XVI

Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the courts and magistrates of every other State.

XVII

New States lawfully constituted or established

within the limits of the United States, may be admitted, by the Legislature, into this government; but to such admission the consent of two thirds of the Members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the public debt, which shall be then subsisting.

XVIII

The United States shall guaranty to each State a Republican form of government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence.

XVIIII

On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.

XX

The Members of the Legislatures, and the executive and judicial officers of the United States, and of the several States, shall be bound by oath to support this Constitution.

APPENDIX

XXI

The ratification of the Conventions of States shall be sufficient for organizing this Constitution.

XXII

This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a Convention chosen in each State, under the recommendation of its legislature, in order to receive the ratification of such Convention.

XXIII

To introduce this government, it is the opinion of this Convention, that each assenting Convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the Conventions of States, should appoint and publish a day, as early as may be, and appoint a place for commencing proceedings under this Constitution; that after such publication, the Legislatures of the several States should elect Members of the Senate, and direct the election of Members of the House of Representatives; and that the Members of the Legislature should meet at the time and place assigned by Congress, and should, as soon as may be, after their meeting, choose the President of the United States, and proceed to execute this Constitution.

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